

Mid-State, Inc. and International Brotherhood of Electrical Workers, Local 1205, AFL-CIO.
Cases 12-CA-18330, 12-CA-18641-1, -3, -4, -6, 12-CA-18731, and 12-RC-8071

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND BRAME

On July 17, 1998, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Contrary to our dissenting colleague, we find, in agreement with the judge, that the statements made to employees by Superintendent William Patton McLeod on April 14 and 16, 1997, and statements made to an employee by Supervisor Tommy Dampier on April 18, 1997, were not objectionable and did not violate the Act.

On April 14, in the presence of McLeod, employees were discussing the Union, and their objections to visits to their homes by Union Representative Kenneth Sykes. McLeod stated, "If he [Kenneth Sykes] comes onto my property, I'll fill his butt with lead. Florida law says I can defend my property that way." The judge found that such hyperbole would not tend to be coercive in the context of an informal discussion in which employees were voicing displeasure at the home visits.

Based on credited testimony, the judge found that on April 16, as employee Brenda Thompson was passing out a union flyer to employees and management, McLeod told Thompson that if Sykes came over right then (there is no evidence that Sykes intended to), McLeod would "kick his ass." The judge found that this remark was the result of McLeod's being upset about rumors, which he attributed to the Union, that McLeod was a member of the Union. McLeod had vehemently denied such union membership. The judge found that McLeod's remarks were based strictly on his belief that the Union was circulating lies about him, and not on any protected activities of the employees. He therefore found that the remarks would not tend to coerce employees in the exercise of their Section 7 rights.

Concerning the April 18 remarks involving Supervisor Dampier, the judge found that there was no connection to union activities. Based on credited evidence, the judge found that Dampier and employee Stephen L. Suggs drove Dampier's truck to the job trailer. Suggs stayed in the truck and Dampier went into the trailer. Suggs heard a "ruckus," and when Dampier returned to

the truck, he told Suggs that he (Dampier) and employee Thompson had argued over Thompson's calling Dampier a liar, and that Dampier had dared Thompson to call him a liar again. Had Thompson done so, Dampier told Suggs, Dampier would have kicked Thompson's butt, and it almost would have been worth \$1000 to have "decked" Thompson.

The judge found that, as far as employee Suggs knew, there was no connection between Dampier's remarks and Thompson's union activities. There was no reference to Thompson's activities, or to the Union generally. The judge thus found that there was no union-related threat against Thompson, and thus no violation of the Act.

We agree with the judge's dismissal of the allegations relating to these three events. The test in determining whether an employer's conduct constitutes unlawful threats of retaliation for employees' engaging in protected activity is whether the conduct may reasonably be said to have the tendency to interfere with the free exercise of employee rights under the Act.¹ Concerning McLeod's remarks of April 14 and 16, it is quite apparent, as the judge concluded, that these were the result of McLeod's belief that the Union was spreading rumors that McLeod was secretly a member of the Union, and that McLeod had a strong dislike for Sykes, the union representative whom he held accountable for the rumors. More significantly, as the judge found, and the record shows, employees were aware of the reason for McLeod's statements. Employee Thompson acknowledged such knowledge, and the Respondent had sent letters to the employees advising them that the rumor of McLeod's membership in the Union was false. In these circumstances, we agree with the judge that McLeod's statements would not reasonably have the tendency to interfere with, restrain, or coerce the employees in the exercise of their Section 7 rights.

We also agree with the judge that there was nothing to show that Suggs believed that Dampier's remarks related to the Union or to protected activities. Our dissenting colleague notes that the confrontation between Thompson and Dampier concerned Thompson's filing of a charge shortly before the election. However, we note that the allegedly coerced employee here was Suggs, not Thompson. There was nothing said to Suggs, shortly after the confrontation between Thompson and Dampier, to lead Suggs to believe that the confrontation was linked to Section 7 activities. Although Dampier had previously mentioned to Suggs that Thompson seemed to be the main instigator of the Union, that mentioning occurred 2 months before the confrontation. In our view, this asserted link is far too tenuous to overturn the judge's finding that Suggs would not connect Dam-

¹ *MK Railway Corp.*, 319 NLRB 337, 342 (1995); and *Cox Fire Protection*, 308 NLRB 793 (1992).

pier's comment to Thompson's charge filing. Thus, Dampier's remarks were not objectionable, and were not an interference with protected activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mid-State, Inc., Gainesville, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN TRUESDALE, dissenting in part.

Contrary to my colleagues, I would find that Superintendent William Patton McLeod's statements to employees on April 14 and 16 (1997), and Supervisor Tommy Dampier's statement to employee Stephen L. Suggs on April 18, 1997, each violated Section 8(a)(1) of the Act.¹ Each statement is a threat of physical violence directed at union activity that would have a tendency to interfere with employees' exercise of their Section 7 rights.² Further, since these unlawful statements were made during the critical preelection period, I would set aside the April 18, 1997 election, and direct a second election.

Michael R. Maiman, Esq., for the General Counsel.

William E. Sizemore, Esq. (Thompson, Sizemore & Gonzalez), of Tampa, Florida, for the Respondent, Mid-State.

Kenneth G. Sykes, Rep., of Gainesville, Florida, for the Charging Party, Local 1205.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a salting case. Finding insufficient evidence as to most of the Government's allegations, I dismiss the bulk of the General Counsel's July 15, 1997 complaint. I recommend that the Board dismiss the Union's objections to the election of April 18, 1997, and that it certify the results of that election.

I presided at this 6-day trial (opened August 25, 1997 and closed October 15, 1997) in Gainesville, Florida. Trial was pursuant to the July 15, 1997 consolidated complaint (complaint), the Union's objections (filed April 25, 1997), and the July 24, 1997 order of the Regional Director for NLRB Region 12 consolidating these matters for hearing. Issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 12 of the Board, the July 15 complaint is based on charges filed against Mid-State, Inc. (Mid-State or Respondent), beginning August 30, 1996 with the charge, served September 5, 1996, in Case 12-CA-18330,

by the International Brotherhood of Electrical Workers, Local Union 1205, AFL-CIO (Union or Local 1205).¹

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Mid-State and that Mid-State is a statutory employer. At trial, the parties stipulated that the Union is a statutory labor organization. (1:19).²

The complaint alleges that, on various dates between June 7, 1996 and April 21, 1997, Mid-State violated Section 8(a)(1) of the Act by various threats and other statements by its supervisors. Mid-State violated Section 8(a)(3) of the Act, the Government alleges, by refusing to hire, or consider for hire, 18 named job applicants between April 30, 1996 and January 21, 1997. Additionally, the complaint alleges that Mid-State violated Section 8(a)(3) of the Act when it discharged Jose Ayala on February 4, 1997 and Charles Albert on March 31, 1997. The complaint alleges that certain employees began an unfair labor practice strike on August 12, 1996, that, on February 24, 1997, striker Bruce Audette made an unconditional offer to return to work, and that, since such date, Mid-State has refused to reinstate Audette, thereby violating Section 8(a)(3) of the Act. Finally, on two dates in December 1996 and January 1997, the complaint alleges, Mid-State refused to hire or consider Ken Sykes or George Snowden in violation of Section 8(a)(4) of the Act. Admitting certain facts, Mid-State, by its answer, denies violating the Act. (As discussed later, on brief Mid-State admits two allegations about the promulgation of a no-solicitation rule.)

For the first of the Government's 22 witnesses, the General Counsel called Mid-State's president, William R. Samples. Samples also testified as one of Mid-State's eight witnesses, as did his son, Vice President and General Superintendent William R. Samples Jr. [References to "Samples" are to President Samples, and "Samples Jr." refers to Vice President Samples.] Kenneth G. Sykes, the Union's organizer and representative at trial, and one of the General Counsel's witnesses, also testified as the Government's rebuttal witness. Mid-State offered no evidence in surrebuttal.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and by Mid-State, I make these

FINDINGS OF FACT

A. Mid-State's Operations

An electrical subcontractor in the construction industry, most of Mid-State's work is commercial construction. (1:47, Samples). The company commonly is known, on the "street," as Mid State Electric. (1:48). Mid-State maintains its office at Gainesville, Florida. (6:1166, Samples Jr.). Mid-State apparently was founded by Samples and a Mr. Griner at some time before 1979. Griner retired in 1994. (5:896). For a time, Mid-State operated under a prehire contract with the Union, but that relationship ended in July 1979. (1:48, 68; 6:1100). Since then, Mid-State has operated nonunion. (1:48). From that relationship in the 1970s, Samples (1:82) has known the Union's current business manager, Harold Higginbotham (4:756-757), and (1:80) Kenneth Sykes, assistant business

¹ I agree with my colleagues on every other issue.

² My colleagues fail to note that the election day confrontation between Brenda Thompson and Dampier concerned Thompson's filing of an unfair labor practice charge "not many days before the April 18 election." Since the judge credited Suggs' testimony that Dampier told him that Brenda Thompson was the "main instigator" of the Union, Suggs would have reason to believe that the "ruckus" between Thompson and Dampier was related to union activity even if he did not know the precise details of the dispute.

¹ All dates are for 1996 unless otherwise indicated.

² References to the six-volume transcript of testimony are by volume and page. Exhibits are designated JX for the joint exhibits, GCX for the General Counsel's, and RX for those of Respondent Mid-State. No exhibits were offered by the Union.

agent and organizer (4:805), who in those days worked as a journeyman (1:80). Sykes testified that he and Samples Jr. worked together as journeymen in the 1970s. (4:828). Sykes and Higginbotham were among the Government's witnesses here.

[In the Government's opening statement, the General Counsel asserts (GCX 2 at 1) that the case is about an employer who decided he no longer wanted to use union labor "because he wanted to put more money in his own pocket." As no evidence was offered thereafter to substantiate the quoted description of motivation ascribed to Mid-State, I shall disregard the General Counsel's unsubstantiated and inappropriate conjecture.]

During 1996, Mid-State typically employed about 30 to 40 production, or field, employees. The "nonfield" employees consisted Samples, Samples Jr., Office Manager Brenda Thompson, a chief estimator, and a receptionist/secretary. (1:67-68).

Field Superintendent William Patton McLeod was a prominent witness for Mid-State. At least during the relevant time, McLeod maintained a daily log, or notes that he usually wrote at the end of each day. (5:957, 1004-1005). Samples Jr. testified that during the relevant time Mid-State did not have a practice of issuing written warnings and entering such into an employee's personnel file. Instead, the foremen and job superintendents would talk with the individuals (6:1105) and would maintain daily logs in which they would enter notes about (6:1104) "events that happened on the job." It seems, therefore, that these logs of the field supervisors pertained more to personnel matters than to progress of construction on the jobs. That certainly is true of the portion (5:1004-1005) of the log (GCX 19, not offered) maintained by McLeod which (RX 18, received) is in evidence. Indeed, those notes (RX 18) of McLeod are very much akin to logs frequently kept by supervisors of employers involved in union organizing campaigns in that McLeod's notes here (RX 18) pertain mostly to union matters and to employees identified, in the record, as supporters of the Union.

B. Overview of the Union's Organizing Campaign

So far as the record shows, the Union began a campaign to organize Mid-State by a program of "salting"—both overt and covert. The salting began on April 30, 1996 when Union Organizer Kenneth Sykes and five other union members went to Mid-State's office. Speaking for the group, Sykes told the receptionist that they were looking for work. The receptionist, assertedly Kimberly Walton, said that Mid-State was not hiring. Sykes asked whether they could leave applications, but Walton said that Mid-State was not accepting applications, names, or telephone numbers.

[Office Manager Brenda Thompson recalls that Walton was not hired until May 6, 1996. (5:916, 926). The stipulated (1:20-22) list of hires shows that Walton was not hired until July 8, 1996 (JX 1 at 1). As Thompson explains, however, Walton had been on the job as a Temporary Force temporary employee for about 2 months before she was hired (as a regular employee) in July. (5:930-931). In any event, whoever Mid-State had serving as the receptionist was Respondent's agent for the purpose of responding to routine employment inquiries. *AMI*, 319 NLRB 536, 540 (1995) ("clerical employee"); *Diehl Equipment Co.*, 297 NLRB 504, 504 fn. 2,

506-507 (1989) ("Beryl Dyer, seated at a desk immediately inside the entrance.".)]

Sykes replied that they had heard from All Florida Electric that Mid-State had borrowed some of All Florida's employees and that they therefore thought Mid-State might be needing some men. The receptionist then summoned Samples Jr. and Leon Burgess, an estimator. When they arrived, Sykes repeated what they had heard from All Florida Electric, stating that they therefore thought that Mid-State might be needing some help. They (Sykes recalls that Samples Jr. and Burgess each spoke at times) said that Mid-State did not borrow any employees from All Florida and that Mid-State was not hiring. Sykes thanked them and the group left. (4:811-813, 831-832).

On various dates thereafter, through January 21, 1997, as alleged in complaint paragraph 10, another dozen union members, including Harold Higginbotham, Business Manager of Local 1205 since June 1995 (4:757), attempted to apply for work. All 18, who either openly were wearing union insignia, or were otherwise identifiable as part of a group of union members, were told that work was not available and that applications were not being taken. None of the 18 was hired. Mid-State contends that the requests came when Mid-State was not hiring and that, for the most part, its jobs were winding down and other jobs had not reached the stage for needing additional help. The General Counsel counters that, during the same periods, Mid-State hired employees who previously had worked nonunion.

By letter (GCX 4) dated January 29, 1997, the Union notified Mid-State that three of Mid-State's employees were organizing on behalf of the Union: Michael Cooper, Jose Ayala, and Steven James. As McLeod's notes (RX 18 at 1) reflect, that same day Cooper and Ayala informed McLeod that they would be organizing for the Union. Two days later, on January 31 as McLeod's notes reflect (RX 18 at 1), Daryl Thompson, Steve James, and Mark Poucher informed McLeod that they, too, were organizing for the Union. By its letter (GCX 3) of February 5, 1997, the Union confirmed this by adding their three names (Daryl Thompson, Mark Poucher, and Charles Albert) to its published list of employee-organizers, bringing the total to six. The letters also were faxed, for when Michael Cooper and Jose Ayala attempted to hand copies of the letters to Superintendent McLeod about February 5, he declined to accept, saying that they already had been faxed. (2:135, 171).

Eventually, on March 7, 1997, the Union filed its election petition (GCX 1y) in Case 12-RC-8071. Pursuant to a stipulated election agreement approved March 21, 1997 by the Regional Director for NLRB Region 12, an election was conducted on April 18, 1997 among Mid-State's employees in a bargaining unit consisting of (GCX 1(II)):

All electricians, electrician helpers and apprentices employed by the Employer at its Gainesville, Florida facility, **excluding** all other employees, guards, and supervisors as defined in the Act.

The vote count was 4 Yes, 20 No, and 15 challenged ballots. The challenged ballots were not sufficient in number to affect the results of the election. The Union filed objections on April 25, and NLRB Region 12 investigated them. By her order of July 24, 1997, the Regional Director directed a hearing on the challenged ballots and consolidated these cases for

hearing. The Region's investigation obtained evidence that, during the critical period of March 7 through April 18, 1997, Mid-State engaged in certain additional conduct which is alleged as unlawful in the complaint. Such additional conduct, not specifically alleged in the objections, is directed to be considered as additional objections to the election under established Board law. The General Counsel relies on the alleged 8(a)(1) incidents, plus the testimony of former receptionist Michelle DeBois, to show animus.

C. Asserted Background Animus

To show background animus, the General Counsel called Michelle DeBois. Hired in May 1994 on a 6-month probationary (in effect) basis, DeBois worked as a receptionist for Mid-State until her November 1994 layoff for lack of work. (1:99, 109–110, 113–114; 5:897–898). When Office Manager Brenda Thompson (DeBois' supervisor) took a day off before Thanksgiving, DeBois approached President Samples about taking on more of Thompson's work because she, DeBois, was not busy. When Thompson returned, Samples told her that if DeBois did not have enough work to keep her busy then DeBois' employment should be terminated. Thompson called in DeBois and explained the basis of her layoff. Reacting angrily, DeBois flung open the glass door of Thompson's office with a bang, stormed out of Thompson's office (calling Thompson a "stupid bitch" when Thompson offered her help in finding other employment), and drove off to the sound of her tires squealing in the parking lot. Thompson treated the termination as a layoff and did not contest DeBois' claim for unemployment compensation. (5:909–912, 935).

DeBois testified that certain statements were made to her by Samples (about not handing out applications because the applicants were union) and Thompson (that Mid-State swapped employees with Preston Electric, and hired former employees, to avoid the Union). I credit Samples and Thompson over DeBois. As they credibly report, Samples explained to DeBois that Mid-State gives out applications only when it is hiring, and that they would advise DeBois when Mid-State was hiring. Nothing was said about a union. The documentary evidence (RX 16) supports the version of Samples, Samples Jr., and Thompson that, in 1994, Mid-State loaned employees to Preston Electric. If Preston Electric's records reflected that Mid-State had borrowed any of Preston Electric's employees during 1994 (in, supposedly, some effort to avoid hiring union employees), presumably the General Counsel would have subpoenaed and introduced such documents. The Government offered no such documents.

Admitting that she went to Union Representative Sykes when she was laid off, and that she was angry, DeBois asserts that her anger was not at Mid-State, but at her (perceived) mistreatment and the (claimed) mistreatment of others. (1:122–123). DeBois' demeanor impressed me unfavorably. In light of that and the record evidence, I find that, as a witness, DeBois was, and remains, so angry at Mid-State, and so filled with a desire for revenge over her termination, that her testimony is unreliable. I do not credit her description of incidents which, with a different finding, could show background animus.

Just as DeBois was excused as a witness, Mid-State requested any statements given by her in the Government's possession. I denied the request as untimely. (1:123). See *Longshoremen ILA Local 20 (Ryan-Walsh Stevedoring Co.)*, 323

NLRB 1115, (1997) (request untimely when made well into the cross examination).

For another example of background animus, the General Counsel offered the testimony of Bruce Audette. Audette testified with an unfavorable demeanor and, generally, I do not believe him. According to Audette, who was rehired in early April 1996 at \$8 per hour by Samples who remembered Audette from his earlier employment with Mid-State (4:685, 689, 752), he initially spoke with Samples Jr. who said that Mid-State was not hiring. Audette persisted, pleading that he needed a job. To Samples Jr.'s (asserted) question, "Are you in the Union?" Audette replied no, adding that he had worked for Mid-State about 10 years earlier. At that Samples Jr. said that Audette could go talk to Samples at the shop. (4:685–686, 744, 752). The General Counsel offered the foregoing only for background animus. (4:686–688). [It seems a bit odd that the incident was not included in the complaint, for the early April 1996 date is within the statutory limitation period.]

During his own testimony, Samples Jr. does not address this matter. That omission perhaps was an oversight, for Mid-State (Brief at 25 fn. 6) represents that counsel overlooked asking Samples Jr. about the alleged June 7, 1996 threat (discussed in a moment) not to hire union supporters. Nothing is represented there about the claimed April 1996 interrogation.

Audette's report of the single-question interrogation was delivered in a rather contrived fashion [he fumbled the phrase at first, 4:686, and on cross examination shifted to a more natural phrasing, "asked me if I was Union," 4:744], suggesting that he was repeating a memorized phrase to be "planted" in an otherwise legitimate conversation. While the conversation could include such a question and answer, without the claimed interruption the conversation has a smooth and logical flow, with Samples Jr. not referring Audette to Samples until Audette mentioned that he previously had worked for Mid-State. Although Audette was not a union member in April 1996, he joined the Union about early August 1996. (4:684, 691–692; GCX 13). Not believing Audette, I find that he fabricated the single-question interrogation and planted it in the conversation with Samples Jr. in a clumsy attempt to harm Mid-State.

D. The Incidents of Alleged Animus

1. June 7, 1996—William R. Samples Jr.

According to Audette, on June 7 Samples Jr., while delivering paychecks, approached Audette and Tony Baccili where the two were working. Calling Audette aside, Samples Jr. asked him if he knew of any qualified persons who needed a job, "but I don't want anybody that's a Union member." [Complaint paragraph 5.] Saying he did not know of anyone, Audette said he would ask around, but "I never referred anyone to him." (4:690–691). On cross-examination Audette recalls the phrasing as, "asked me if I knew any electricians that were nonunion that were good electricians, that needed a job," and that Samples Jr. "just said that he didn't want to hire Union people." (4:745).

Already a covert member of the Union when he was hired on May 17 (3:517–518, 520, 534–535, 561; JX 1 at 1), Anthony Baccili Jr. (who gave no pretrial affidavit to NLRB Region 12, 3:530) maintained his own log (RX 8) of events at Mid-State. In his log for June 7, Baccili made a note that the word being passed around on the job was that Mid-State was temporarily running out of work and that there would be a layoff in July. (3:536–537). Indeed, Baccili testified that the

medical center job, to which he was assigned on being hired (3:519, 531), already was near completion when he arrived on the job (3:531). Baccili was assigned to install some telephone conduits at the medical center. (3:532–533; 6:1143).

The key point here respecting Baccili is that the General Counsel did not ask him to corroborate Audette's testimony that, on June 7, Samples Jr. came through distributing paychecks, pulled Audette aside and held a brief conversation with him. In view of the friendly relationship between Baccili and Audette, it seems reasonable to find, as I do, that Audette would have reported to Baccili the contents of his supposed conversation with Samples Jr. Moreover, one would assume that—had it happened—Baccili would have noted this event in his log (RX 8) for June 7, especially the part about Samples Jr.'s not wanting to hire any Union people. As the General Counsel did not ask Baccili about his event, I find that the log contains no entry for such an event.

In view of Baccili's failure to corroborate Audette's claimed version of the asserted June 7 conversation with Samples Jr., and in light of Audette's lack of credibility, I find that no such conversation occurred. Accordingly, I shall dismiss complaint paragraph 5.

2. August 7 and 12, 1996—Don Patscheider

As amended at trial (3:517), complaint paragraph 6 alleges that Mid-State, by Patscheider, "orally promulgated a no solicitation rule which prohibited solicitation during break time." By its answer, Mid-State denied. The evidence convinced Mid-State otherwise. "Based upon the testimony presented, Mid-State now admits to this violation." (Brief at 40). On brief Mid-State represents that the supervisors at Mid-State found out, too late, that the employees had a right to solicit for the Union in the construction trailer during breaks. Mid-State also notes that no employee actually was stopped from engaging in such solicitation, nor was any employee disciplined for such conduct. Nevertheless, such a rule tends to discourage support of a union. I find that the rule violates Section 8(a)(1) of the Act, as alleged in complaint paragraph 6 (in conjunction with paragraph 14), respecting no soliciting in the job trailer (where many employees took their breaks).

3. Patton McLeod

a. August 12, 1996

Complaint paragraph 7(a) alleges that Superintendent Patton McLeod, about August 12 at the University of Florida's Physics Building jobsite (in Gainesville), "threatened that Respondent would close its business if employees were represented by the Union." Mid-State denies. In support of the allegation, the General Counsel called Anthony Baccili Jr. and Bruce Audette, and Mid-State called William Patton McLeod.

As described by Baccili (who impressed me as straightforward, candid, and credible), on August 12 he and Audette approached Superintendent McLeod outside the general contractor's trailer. Baccili told McLeod that he was going on an unfair labor practice strike because he was told he could not solicit for the Union during employee breaks in the construction trailer. McLeod said he could not stop him. (3:528–529, 550–552). Audette (3:551; 4:699) told McLeod that he, too, was going on strike. (5:971–972, 1013–1015, McLeod).

Baccili told McLeod that he had worked for him and respected him, but that if McLeod's wife "should happen to get hit by a car tomorrow, you have absolutely no insurance. You

have nothing there for your future, as far as working for Mid-State. There are no benefits." "But, Tony," McLeod replied, "the only thing about it is, Billy Samples Jr. will not go union. He will fold this shop, and basically, he will put me out of work." (3:552). I do not credit Audette's somewhat different version of the conversation because it differs from Baccili's and because, as I have found, Audette is an unreliable witness. Nor do I credit McLeod's denial that he said anything about the company's closing. (5:972).

It is immaterial that McLeod's shutdown statement could be interpreted as his own opinion of what the owner would do, and this is true even though Samples Jr. (6:1101) owns none of Mid-State's stock. Nothing in the record indicates that Samples Jr. ever disclosed to any employee the fact that he owned none of the stock. Because of McLeod's status as a superintendent, and his daily working relationship with Vice President Samples, in this small family-owned company, employees reasonably would conclude (as, in effect, Baccili did conclude, 3:554) that McLeod had heard Vice President Samples make this prediction.

Such prediction was not based on any described objective facts. An employee would have no way of knowing whether the Samples were financially able to retire rather than deal with a union. McLeod's statement was nothing less than a threat of retaliatory closing. I find that, as alleged, Mid-State violated Section 8(a)(1) of the Act by Superintendent McLeod's threat that Vice President Samples would close the company rather than see the employees represented by a union.

b. February 3, 1997

Complaint paragraph 7(b), in conjunction with paragraph 14, alleges that Mid-State violated Section 8(a)(1) of the Act about February 3, 1997 when Superintendent McLeod "created the impression that employees' union activities were under surveillance." Mid-State denies. To prove this allegation, the General Counsel called Jose Ayala. McLeod testified in opposition.

The morning of Monday, February 3, 1997, Ayala testified (2:276–277, 294), Aaron Harvey was assigned to be his helper. When Ayala was on a ladder later that morning, Superintendent McLeod came and called Harvey from the room. Although McLeod and Harvey apparently stood outside the room, Ayala could hear McLeod tell Harvey that if Ayala starts talking about the Union, "you tell him you're not interested and let me know right away." Harvey did not testify.

McLeod testified that other employees (Dan Kelly and announced Union supporter Steven James) supposedly had complained to McLeod that Ayala was talking too much and interfering with their working. (5:947–948, 950). This was before Ayala was moved to work alone in the basement. Because Ayala has a health condition cautioning against his working alone on a ladder, a helper (Aaron Harvey) was assigned to assist Ayala (5:948–949). According to McLeod, Harvey approached him (no location specified), said he had no desire to join the Union, did not want to lose his job, did not want to hear anything from the Union, and if Ayala continue to talk about it, what should Harvey do.

McLeod told Harvey that he could tell Ayala that he had no desire to join the Union or to hear about it, and if Ayala, or anyone, continues, then "let me know" and McLeod would

handle it. At best, this is only an indirect rebuttal of Ayala's version.

Ayala testified in detail. Few details are given by McLeod, and none describing the location of the supposed conversation with Harvey. Presumably it was later than the first morning of the assignment in order for there to have been time for conversations. Ayala asserts that, as of the time of McLeod's visit to Harvey, Ayala had not spoken to Harvey about the Union. (2:295).

Crediting Ayala's detailed account, persuasively described, over McLeod's generalized version, I find that the event occurred as Ayala describes. The General Counsel argues that McLeod's "let me know right away" solicited Harvey to spy on Ayala's union activities and would tend to create the impression that Ayala's union activities were under surveillance. Agreeing with the General Counsel, I find that Mid-State, by Superintendent McLeod's conduct of February 3, 1997, violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 7(b).

c. April 14 and 16, 1997

Complaint paragraph 7(c) alleges that, about April 14 and 16, 1997, Superintendent McLeod "threatened physical violence against a union organizer in the presence of employees." Mid-State denies.

Rehired on March 19, 1997, Zot Szurgot had worked for Mid-State 4 weeks in the summer of 1996. (3:418, 432; JX 1 at 1, 4). He joined the Union some 3 to 4 weeks before the April 18, 1997 election. He wore no union insignia. About 6 weeks after the election, Szurgot left Mid-State for a better job with a union contractor. (3:430-431).

About Monday, April 14, 1997, in Mid-State's construction or job trailer at the jobsite, a discussion ensued concerning visits the past weekend to employee homes by Ken Sykes of the Union. At least two or three employees were present, plus Superintendent McLeod. Some employees expressed their objections to these home visits. McLeod, Szurgot testified, stated, "If he [Kenneth Sykes] comes onto my property, I'll fill his butt with lead. Florida law says I can defend my property that way." (3:424-425, 439-441).³ Responding to a question on cross examination whether McLeod appeared to be bragging rather than making a statement of serious intent, Szurgot testified that it would be difficult for him to gauge McLeod's seriousness because McLeod is a "go-getter," a person who is "ready to pick up and do things at a moment's notice." (3:439). McLeod denies threatening to shoot Sykes, and acknowledges that he said that Sykes would be asked to leave if he came to McLeod's house, and that McLeod had a "big bad dog." (5:976-977).

Crediting Szurgot, I find that, on such occasion, Superintendent McLeod simply expressed a bit of preelection exaggeration. Finding that such hyperbole would not tend to be coercive, in the context of an informal discussion in which several employees were expressing displeasure at home visits by the Union's organizer, and in view of the fact that the statement carried no threat of offensive action by McLeod, I shall dismiss complaint paragraph 7(c) as to April 14, 1997.

Daryl Thompson was hired by Mid-State on January 20, 1997 (2:131; JX 1 at 4). Although Thompson (the Union's observer at the April 18, 1997 election; 2:158) denies being sent by the Union as a covert salt, claiming that he merely obtained permission to work at Mid-State by alerting the Union that he probably would apply (2:167), Union Organizer Sykes, who was present throughout the trial (6:1189), directly contradicts this, testifying that he personally sent Thompson to apply as a covert salt (6:1193). Apparently supporting Thompson's version, Samples Jr. credibly asserts that, when he hired Thompson, Thompson was wearing an IBEW ball cap. (6:1107).

Aside from this dispute between Thompson and Sykes, Thompson testified that about April 16 (2 days before the August 18, 1997 election) he passed out copies of a union election flyer to employees (including Mark Poucher and John Ulmer) and management standing by the job trailer at the Physics Building just after the 3:30 p.m. quitting time. According to Thompson, Samples Jr., pointing a finger in Thompson's face, began screaming about Union lies. McLeod, standing about 2 feet higher on a walkway leading to the trailer door, "screamed" down that Thompson did not know shit, that Kenny Sykes was a fucking asshole, and that if Sykes were to come over there right then that McLeod would "kick his ass." Thompson does not recall the content of the flyer he distributed. Thompson acknowledges that, at some point, there was an issue over the Union's purported circulating a story that Superintendent McLeod was a member of the Union, a rumor which McLeod "vehemently denied." Finally, Thompson concedes that, so far as he knew, Union Organizer Sykes had no plans that day to come to Mid-State's job trailer at the Physics Building. (2:154-156, 189-191, 195).

McLeod made a note of the April 16 "altercation" between union and nonunion employees that occurred that day after work. (5:976; RX 18 at 10). Earlier that week, apparently, Mid-State had sent letters to employees advising that the rumor of McLeod's membership in the Union was false. (5:975; RX 18 at 10). [Mid-State did not introduce a copy of the letter for the record.] Irritated at the lies purportedly promoted by the Union, on this April 16 McLeod told Daryl Thompson that it was the second time that the Union had said he was a member of the Union. McLeod stated that he was not a member of the Union, and that "Kenny Sykes was a liar if he said" that McLeod was a member. McLeod added that Thompson should so tell Sykes, and if Sykes did not like it, "we could step across the fence and settle it like men." McLeod denies saying he would kick Sykes' ass. (5:976; RX 18 at 10). Samples Jr.'s version is consistent with McLeod's. (6:1163).

Finding some embellishment by Thompson as to McLeod's "screaming," I credit both Thompson and McLeod in finding that, on this occasion, McLeod, upset about lies about him, which he attributed to the Union, told Thompson that, if Sykes came over right then, McLeod would "kick his ass." As McLeod's expression of outrage was based strictly on asserted lies by the Union about his rumored membership in the Union, and not on any protected activities of employee or of the Union on their behalf, I find that McLeod's threat to whip Union Organizer Sykes would not tend to coerce employees in the exercise of their Section 7 rights. Accordingly, I shall dismiss complaint paragraph 7(c) as to April 16, 1997, and, therefore, paragraph 7(c) in its entirety.

³ At trial, the General Counsel forgot about the Florida law portion (3:439-440), and that mental lapse carried over into the Government's brief (Br. at 17).

4. February 3, 1997—William R. Samples

Complaint paragraph 8(a) alleges that, about February 4, 1997, President Samples orally promulgated “a no solicitation rule which prohibited solicitation during breaks.” By its answer, Mid-State denied the allegation. As earlier noted, however, on brief (Brief at 40) Mid-State admits both allegations, complaint paragraphs 6 and 8(a). As I stated earlier, the evidence justifies this admission by Mid-State. Accordingly, by such promulgation on February 3, 1997 (the correct date), I find that, as alleged, Mid-State violated Section 8(a)(1) of the Act.

Complaint paragraph 8(b) alleges that, about February 4, 1997, President Samples “Threatened to sue employees personally in retaliation for their union activities.” Mid-State denies.

As Superintendent McLeod’s notes reflect (RX 18 at 2), on Monday, February 3, 1997, a meeting was held between the management (President Samples, Vice President Samples Jr., Superintendent McLeod, and Foreman Bernie Oberst) and the employee organizing committee (Daryl Thompson, Michael Cooper, Jose Ayala, and Steven James). That morning Foreman Oberst told the four employees to follow him to the job trailer where they assembled before the waiting management group. President Samples spoke for the management group. (2:137–138, Thompson; 2:271–273, Ayala; 5:962, McLeod).

Samples asked what they meant by a reference in one of their flyers to Section 7 of the Act. Thompson said that the law permitted the employees to organize. Samples said that as long as the group stuck with that they would have no problem. Then producing one of the Union’s recent flyers (no copy identified or offered into evidence), Samples displayed the flyer for all to see. Pointing to the inscription at the bottom asserting authorship by the Mid-State Organizing Committee, Samples asked if that was the group. Each employee said yes. Samples then asked who was the chairman. Thompson said he was. To confirm that fact, Samples asked each of the others if Thompson was chairman of the organizing committee, and each replied yes.

At that point Samples again picked up the flyer. He told the group of employees that the flyer contained false statements. (The flyer had a small cartoon picture of a tearful young girl asking, “Why doesn’t my daddy have insurance?”). Samples said he had been advised that he could sue them for slander because Mid-State does provide insurance for employees. Thompson said that if Samples had a complaint he should speak to the Union. Samples answered that he would not deal with the Union, and that as they were the organizing committee, he could sue each of them for slander. Thompson said that if Samples felt that was necessary then he should proceed in whatever manner he thought proper. Samples replied that he would not sue, or was not planning to sue, or had no intention of suing them. About then the meeting ended. During the meeting, Samples spoke in a calm manner. (2:138–140, 174–175, 273–274, 296; 5:962, 1013).

At trial Thompson was unable to recall much about Mid-State’s insurance benefit, but he (2:176) and Ayala (2:297) testified that employees had to pay for all or part of their coverage. Mid-State offered no evidence describing its health insurance coverage for employees and what portion, if any, of the premiums the employees had to pay as of February 1997. As a result, the record is left in something of an ambiguous state concerning the extent of coverage if employees did not

elect to pay for coverage. Moreover, as Thompson testified, employees had to wait 90 days before they were eligible. Mid-State’s insurance “didn’t necessarily cover everyone in the jobs is, was the point being made.” (2:176). One aspect which is clear is that there was no showing that the flyer’s cartoon statement was made in bad faith (that is, “knowing that the statement was false and made with a reckless disregard for the truth”). See *HCA/Portsmouth Regional Hospital*, 316 NLRB 919 (1995).

The General Counsel argues that having the three top managers (Samples, Samples Jr., and McLeod) facing and confronting the employees, combined with the threat that he could sue each of them individually, but had no intention of doing so, was calculated to chill the union activity of the leaders and “to coerce the employees into forsaking their union activity.” For its part, Mid-State argues that there was no threat and no employee could have been intimidated by Samples’ statement of no intention of suing. No party cites any cases in support of its position or discusses whether the action of the employees was protected or unprotected.

The staged confrontation is rather similar to that which occurred in *Greenfield Mfg. Co.*, 199 NLRB 756 (1972). As for the expressed potential for suing the individual members of the organizing committee, I find that it was a threat to sue, with the threat suspended indefinitely. Different ramifications attach to a threat to sue as distinguished from the actual filing of a civil lawsuit. As to the latter, see *Braun Electric Co.*, 324 NLRB 1 (1997). Respecting threats to sue for slander or liable because of, as here, protected activity, such threats violate Section 8(a)(1) of the Act. *Wellstream Corp.*, 313 NLRB 698, 706 (1994).

Agreeing with the General Counsel, I find that, as alleged in complaint paragraph 8(b) (except as to the date), Mid-State violated Section 8(a)(1) of the Act by the staged confrontation of February 3, 1997, in which President Samples, in the company of his top management, threatened the possibility of a lawsuit against the individual employees for their ostensibly protected conduct. The fact that Samples said he had no intention of exercising his right to sue is no guarantee that he would not change his mind in the future. The point had been made—he could sue, but had no (present) intention of doing so. The qualifying phrase of no (present) intention of suing does not remove the chill of the staged confrontation or the suspended sting of the “could sue” threat. The violation is established.

5. Tommy Dampier

a. February 19, 1997

About February 19, 1997, at Mid-State’s jobsite in Cedar Key, Florida, complaint paragraph 9(a) alleges, Mid-State, by Supervisor Tommy W. Dampier Jr., “promised employees continued employment if they opposed the Union.” By its answer, Mid-State denies.

When hired January 20, 1997 (2:131; JX 1 at 4), Darryl Thompson already was a member of the Union. (2:131). As discussed moments earlier, Thompson was chairman of the Mid-State Organizing Committee whose members, on February 3, 1997, were threatened with a lawsuit by President Samples. Although residing at Trenton, Florida, as of the trial (2:130), Thompson apparently lived at Chiefland, Florida, in February 1997 (6:1132, Samples Jr.).

About mid-February 1997, Thompson agreed to a temporary transfer to Mid-State’s Cedar Key jobsite. (2:148). Samples

Jr. asked Thompson because Thompson, who then lived at Chiefland [about 40 miles southwest of Gainesville, per an atlas] was closer than any of the other employees to Cedar Key. (2:180; 6:1132). Cedar Key, which lies just off the coast some 60 miles or so southwest of Gainesville, was the location of the construction of a marine research center. (5:1048–1049, 1051; 6:1132). Dampier was the job foreman there. (5:1048; 6:1131).

One morning a few days after Thompson's arrival at the Cedar Key jobsite, Foreman Dampier called Thompson into the job trailer and engaged him in discussion about union matters. In this discussion, Thompson testified, Dampier "told me that I was throwing away an opportunity to have a permanent job with Mid-State Electric because of my standing for the Union." (2:144–145, 149).

Dampier testified that, from Thompson's first day at the Cedar Key jobsite, Thompson wore a Union jacket, Union insignia, and had Union stickers on his toolbox. Dampier denies the conversation about permanent employment. (5:1057–1059).

Apparently to show unalleged animus (2:136), the General Counsel cites an additional portion of the asserted conversation in which, Thompson testified, Dampier, becoming agitated, said that if Mid-State went Union, Mid-State would fire everyone, including Thompson, who did not have a journeyman's license from the county. Because of a lack of carded journeymen, Mid-State would have to close its doors within 2 years. That is, because Mid-State would have to pay higher wages, it would not pay unless the person possessed a journeyman's license (card). Thompson and all those joining the Union would be fired. (2:145–147, Thompson).

Acknowledging a conversation with Thompson about what would happen if the Union won an election and had to pay union scale, Dampier explains that he told Thompson that if Mid-State went union the company, in view of having to pay top dollar for journeymen, would call for the best from the Union. In his experience, Dampier told Thompson, Thompson was not one of the best. And if Mid-State had to pay top dollar (union scale) for electricians who were substandard, it eventually would put Mid-State out of business. (5:1059–1060). Thompson concedes that Dampier advanced arguments about the "top dollar/licensed journeymen" and "poor quality/close doors" points. (2:184–186). Dampier earlier had been a member of the Union for several years, and had left with an unfavorable image of the Union. (5:1047, 1065–1066).

Thompson's account of the conversation is a bit garbled, and he delivered it with some hesitation. By contrast, Dampier testified persuasively. Crediting Dampier's version, I find that there was no reference to a permanent job with Mid-State. Respecting the animus portion, Dampier's account of the conversation describes his view of economic forces which would put a financial squeeze on Mid-State. That personal view, whether correct or not, does not reflect animus. Accordingly, I shall dismiss complaint paragraph 9(a).

b. March and April 1997

Complaint paragraph 9(b) alleges that, about March and April 1997, at the Cedar Key jobsite, Supervisor Dampier "stated that employees could not receive raises because of the union campaign." Mid-State denies. Stephen L. Suggs testified in support.

Hired about February 5, 1996, Suggs began working at the Cedar Key project in the fall of that same year. (3:566–567, 588). Suggs rode to and from work with Job Foreman Dampier. (3:570, 576; 5:1051, 1064–1065). Suggs testified that, beginning 4 to 5 weeks before the Board-conducted election of April 18, 1997 [so, beginning a few days after the Union filed its March 7 election petition], Suggs asked Dampier each week, a total of some four to five times, for a pay raise. These requests were made at the jobsite and when they were riding in the company's truck. (3:570–575).

According to Suggs, Dampier replied that Samples Jr. had told him that no one could receive a pay increase (before the election) because it would show favoritism to those who were not openly supporting the Union. [Suggs joined the Union about March 18, 1997. He had not revealed that fact to anyone and had not worn any Union insignia. (3:576, 586).] If Suggs was going to be angry, Dampier added, he should be angry with the Union, for it was the Union's fault that Suggs could not receive a pay raise. (3:572–575, 601–602). Asked why he persisted in repeating his request each of the 4 to 5 weeks before the election [approximating the critical period before the election], receiving the same explanation each time, Suggs testified that he knew Dampier's explanation to be false because "the company would do anything they can to keep from giving me a raise." For his source of information, Suggs relied on his personal experience (although that personal experience does not include any union campaigns) and information from unidentified union members. (3:603). Finally, I note that Suggs insisted to Dampier that the raise had to come before the election, not after. (3:605). Dampier never told Suggs to find another ride to work. (3:606).⁴ According to Suggs, at some point, apparently before the April 18 election, he personally asked Samples Jr. for a raise. Samples Jr. said he would grant one, but, Suggs asserts, "I never got it." (3:602). [Suggs quit after his last day of work, Monday, April 21, 1997, following the Union's loss of the election. (3:600). Dampier testified that Suggs called the following morning, Tuesday, to say that he would be late and not to stop to pick him up. That was the last Dampier ever saw of Suggs. (5:1061–1062).]

Acknowledging that Suggs did ask him for a preelection raise while they were working on the Cedar Key project, Dampier asserts that he told Suggs he did not think it could be done because it would look like favoritism or buying a vote.⁵ Nevertheless, Dampier checked with Samples Jr. who confirmed his understanding. Dampier reported Samples Jr.'s response to Suggs, and Suggs did not ask again. After the election, Dampier testified, Suggs was given a pay increase. (5:1052–1054). As a witness, Dampier was not specifically asked about Suggs' claim that Dampier had told him to be angry with the Union if he was going to be angry with someone.

Neither party offered any payroll records or pay stubs on the matter of whether Suggs received a pay increase at some point in 1997. Although Suggs' last workday was the Monday following the election, a pay increase possibly could have been effective then, or scheduled for that week. As the parties did

⁴ LL. 16–17, at 3:606, should read: "... to ride with someone else so you wouldn't keep asking him?"

⁵ Sometime in late 1996, Dampier received training in the Do's and Don'ts of a union campaign. (5:1049–1050).

not develop the evidence on this point, and as there is no allegation respecting it, I need not resolve the mystery.

Respecting the issue which is alleged, I credit Supervisor Dampier over electrician Stephen L. Suggs. On this point Suggs projected an unfavorable demeanor, giving the impression that he had invented portions of his story after the fact. I do not believe him. By contrast, Dampier delivered his version in a straightforward and believable fashion. I credit him. Dampier was not specifically asked about Suggs' claim that Dampier had said Suggs should be angry with the Union, if at anyone, for it was the Union's "fault" that Suggs could not get a pay raise. Dampier's version implicitly rebuts that charge. In any event, in crediting Dampier, and noting the lack of evidence that Suggs was so upset that he might have appeared angry, I expressly do not credit Suggs' claim that Dampier said it was the Union's fault he could not get a raise. Accordingly, I shall dismiss complaint paragraph 9(b).

c. March 26, 1997

Complaint paragraph 9(c) alleges that, about March 26, 1997, at the Physics building jobsite at the University of Florida, Supervisor Dampier "interrogated employees about their union sympathies." Mid-State denies. On brief, both parties refer, for the supporting evidence, to the testimony of Zot Szurgot. However, alleged discriminatee Charles Albert Jr. also gave supporting testimony.

Rehired March 19, 1997, Zot Szurgot began working at the Physics Building jobsite. (3:417, 419-420; JX 1 at 4 and 3:376). Around late March to early April 1997, Szurgot testified, Supervisor Dampier came to the Physics Building project. Szurgot observed Dampier going from man to man. As the workstations were reasonably close, Szurgot could hear that Dampier was talking about the Union. At that time, Szurgot wore no union insignia and had not openly expressed any support for the Union [or, so far as the record shows, any position against the Union, either]. (3:421-422). Szurgot joined the Union some 3 to 4 weeks before the election. (3:430-431). It is unclear whether he was a member as of Dampier's visit to the jobsite. Szurgot left Mid-State about June 1, 1997 for "a better Union job." (3:431).

When Dampier reached Szurgot on this occasion, he introduced himself, asked whether he was aware of the upcoming election, and whether Szurgot would permit Dampier to relate some of his personal experiences with the Union. Szurgot consented. Dampier showed him a notice from an insurance company informing Dampier that his insurance had lapsed. This predated Dampier's employment with Mid-State. Dampier explained that he had been unemployed at the time and that the Union had not provided him any insurance. According to Szurgot, Dampier then "asked me which way I was going to go." Not answering directly, Szurgot said that he knew who had given him his job and it was not the Union. (3:423).

Dampier had dropped out of the Union in 1993. Although a unionized employer was willing to hire Dampier (when Dampier was unemployed, when his unemployment compensation had been exhausted, and when he was surviving on food stamps), the Union, as Dampier reports, would not clear him to work because Dampier was unable to pay his dues that were in arrears. (5:1065-1066). Conceding that, on the occasion of this visit to the jobsite, he had spoken to each worker, Dampier testified that he told each one he wanted to tell them about the Union, that he was not going to ask them how they were going

to vote, and that they did not have to listen if they did not want to do so. He then told them that if they wanted to work in town rather than traveling that the Union would not be a good choice. The previous year, Dampier asserted, the Union had not obtained a lot of work. Indeed, when he had been working out of the Union, he had been number 300 on the "books," meaning, Dampier explains, that he was number 300 waiting in line to be dispatched to a job. (5:1054-1055).

[Dampier's description at trial appears not to be fully articulated. He seems to imply that, if Mid-State went union and Mid-State, by contract, first had to call the Union for referrals of electricians, current employees of Mid-State would, in effect, lose their jobs because they would be at the bottom of a long out-of-work list. Moreover, when they were called for a job, it probably would be for a job quite some distance from Gainesville. If this was Dampier's message, and if the Union was unable to rebut it effectively (by, for example, explaining that a signatory contractor may call for employees by name so that current employees of Mid-State would not lose their jobs there), then the employees no doubt saw a vote for the Union as economic suicide. That would tend to explain the Union's lopsided 4 to 1 loss in the election of April 18, 1997.]

Respecting his conversation with Zot Szurgot, Dampier asserts that, after obtaining Szurgot's consent to describe his personal [and unfavorable] experiences with the Union, Dampier asked "no more questions" of Szurgot. "Everything there was facts from me to him." (5:1056).

As between Szurgot and Dampier, I credit Dampier. Szurgot's account has such an abrupt fit with the brazenly direct question. While that is not an impossible conjunction, the fit is not a smooth transition, nor is it packaged in a more subtle approach, such as asking Szurgot whether he had any friends or relatives who had ever had any bad experiences with unions—an approach calculated to get Szurgot talking so that an assessment could be made on how he would vote. The attributed question, by being so blatantly direct, is internally inconsistent with the conceded approach which Dampier took—up front on the topic, and obtaining Szurgot's consent for Dampier to tell of his own experiences with the Union. The attributed sequence, which involves a mismatch, raises a real question as to credibility. While neither witness presented a poor demeanor, I was more favorably impressed with Dampier than with Szurgot. With these considerations, and crediting Supervisor Dampier's account, I find that he did not interrogate Zot Szurgot on this occasion.

Turn now to the testimony of Charles Albert Jr. Hired about November 12, 1996 (2:217; JX 1 at 3), Albert has been a member of the Union since 1994 (2:217). Only after he was hired by Mid-State did Albert notify the Union and take on the organizing duties of a salt. (2:252-253). About mid-February Albert began wearing a Union shirt to work. (2:221). About 6:45 a.m. on March 26, as Albert was walking toward the job trailer at the Physics Building, he passed Supervisor Dampier. At the time Albert did not know Dampier nor his position with Mid-State. Albert was wearing his Union shirt. Apparently observing the shirt, Dampier asked, "Are you a union member?" To this Albert responded, "Yes, and proud of it." Albert, who was making his Union connection "open and notorious" by that time, continued walking. Dampier came after him and insisted on relating how the Union had done him wrong and that it would do the same to Albert. Albert testified that he was not intimidated by any of this exchange. Throughout

the day Albert observed Dampier speaking with other employees, but Albert could not hear what was said. (2:223–225, 254). Dampier was not asked, during his testimony, about the encounter with Albert.

Although I credit Albert's uncontroverted account, I find nothing coercive in Dampier's question. Clearly Dampier's question was merely a springboard to what, on seeing Albert's Union shirt, Dampier wanted to tell Albert about IBEW Local 1205. Finding no coercion here, and crediting Dampier respecting the conversation with Zot Szurgot, I shall dismiss complaint paragraph 9(c).

d. April 18, 1997

(1) Facts

Complaint paragraph 9(d) alleges that, about April 18, 1997 [election day], while in a motor vehicle, Supervisor Dampier "threatened violence against a union supporter." Mid-State denies. Stephen L. Suggs testified in support of this allegation.

The General Counsel relies on two remarks assertedly made by Supervisor Dampier as he and Suggs were sitting (or about to ride) in the company truck which Supervisor Dampier drove. (3:584; Brief at 21). The two men had driven in from Cedar Key. It was early afternoon, about an hour before the balloting began. (3:581–582). They had parked at the job trailer at the Physics Building jobsite. (3:580–581; 5:1064). As Suggs had not brought his hard hat, he remained in the truck. (3:590). Dampier apparently disembarked to attend to some business in the trailer.

According to Suggs, when Dampier returned to the truck, Dampier's remarks included two references to violence. (3:584). The conversation is disjointed and poorly developed in the record. The first reference, as described by Suggs, is that Dampier said that Superintendent McLeod "started hearing about the Union and he'd like to meet Mr. Sykes in the parking lot to kick his butt." (3:580). No further details are given. Dampier denies such a reference, but recounts an (undated) incident in which he told Suggs that McLeod was upset over some union stickers having been placed on McLeod's personal vehicle. (5:1057). According to McLeod's personal log, this occurred on February 12, 1997, and on (Thursday) February 13 McLeod told Sykes "to tell his people not to put anything on my truck." (RX 18 at 5).

Rather than the union stickers incident of February, the event more likely in reference is that of "April 14 and 16, 1997," described earlier. I there found no violation when McLeod, emotionally upset at rumors reportedly promoted by the Union that McLeod was secretly a member of the Union, told Daryl Thompson that if Sykes came over right then McLeod would "kick his ass." However, as Dampier credibly denies any such reference on April 18, and in view of the disconnected status of the quote as rendered by Suggs, I find that Suggs (apparently, at some point, having heard about McLeod's statement of kicking Sykes' ass) mistakenly incorporated that into his description of the truck conversation of April 18, 1997. In short, I find that, on April 18, Supervisor Dampier made no reference to a statement by McLeod about kicking Sykes' butt. I therefore will dismiss complaint paragraph 9(d) respecting the reference to Superintendent McLeod.

Turning to the second of the attributed references—a statement by Dampier that it would have been worth \$1,000 for him to have been able to have "decked" Daryl Thompson

(3:583)—I note that the incident is poorly developed in the briefs. The source of this incident traces to a charge (no copy in evidence) which Daryl Thompson admittedly (2:157) had filed over his temporary (some 3 to 4 weeks, 2:149) transfer from the Physics building to help at the Cedar Key project. [Presumably that charge was either dismissed or withdrawn.] The purpose of Thompson's temporary assignment was to do certain outside work. (5:1057–1058; 6:1130–1133). Thompson even told Samples Jr. that he looked forward to the assignment because he could do some fishing in the afternoons. (6:1132). There is no dispute that Thompson told others, including Supervisor Dampier, that he liked working at Cedar Key. (2:187, Thompson; 5:1062, Dampier).

But thereafter, Thompson filed his charge (or the Union filed one on his behalf) on the theory that he never was needed at Cedar Key and that he had been (temporarily) transferred so as to remove his union activities. (2:157, 181). Thompson concedes that none of the other members of the organizing committee was transferred. (2:181).

The charge apparently had been filed not many days before the April 18 election. On April 18, apparently as Supervisor Dampier was returning to his truck (in which Stephen Suggs was waiting), Thompson approached the job trailer at the Physics Building jobsite in order to be released to go to the election to serve as the Union's observer. (2:157). Dampier "immediately confronted me." (2:157, Thompson). Suggs heard a "ruckus" going on, and when Dampier returned to the truck he told Suggs that he and Thompson had argued over Thompson's [earlier] having calling him a liar, and that Dampier had dared him to call him a liar on that occasion. Dampier told Suggs that if Thompson had called him a liar [on that occasion] he would have kicked his butt, and that it would have been worth \$1000 to have been able to have decked Thompson. (3:583, 590–591).

By his account of the incident, Thompson was mostly passive, attempting to explain to Dampier that, even though he had liked the Cedar Key job, he felt he had been sent there to hinder his organizing efforts. (2:157). Dampier became agitated, spitting in Thompson's face as he spoke and "frothing" [Thompson has tendency to exaggerate] at the mouth. (2:157–158, 186). Although Dampier never hit him, Thompson thought he was about to do so. (2:186).

Thompson concedes that Dampier had taken offense at Thompson's filing an unfair labor practice charge over his transfer, yet he previously had told Dampier he liked the assignment. Thompson acknowledges his understanding that Dampier was not upset because Thompson had filed a charge. What upset Dampier was that the charge contradicted what Thompson previously had told Dampier. (2:187).

Acknowledging meeting Thompson on this election day, Dampier contends that he confronted Thompson about saying on the job that he did not like the Cedar Key job when earlier he had told Dampier that he did. But the confrontation "wasn't real nasty." "We met and I told him I didn't appreciate him telling people I was lying [presumably this means that Thompson was denying to others that he had ever said he liked the Cedar Key assignment], when I didn't feel that I was lying. And he then said, 'What are you going to do, hit me?' And I said, 'Well, you just tell me I'm lying and find out.' And that was the end of the confrontation." Dampier denies making any moves toward hitting Thompson. Dampier told Suggs that

it “almost” would have been worth \$1000 to have hit Thompson.⁶ (5:1062–1064).

Thompson’s version is far more detailed and credible than Dampier’s, and I find that such was what happened. When Dampier returned to the truck, I find that he used the term “almost” in qualifying his expressed urge to pay \$1000 to have decked Thompson. [Actually, the presence of “almost” adds little to the meaning, for even without the qualifier, the statement does not assert an intent to do something either then or later.]

I do not credit an add-on version of Suggs, that Dampier, later in the conversation, said he planned to hit Thompson the next time he saw him. (3:591). Suggs demeanor was poor as to this, and he admits leaving it out of two sworn pretrial statements, supposedly remembering it a few weeks before his testimony. (3:592–599, 607–609). As so often when employers come up tardy with reasons for a discharge, Suggs’ late add-on is just as incredible. Crediting Dampier’s denial (5:1063), I find that it did not happen.

(2) Discussion

As discussed in the fact section above, I found that, in his testimonial account, Suggs mistakenly incorporated into his description of the truck conversation of April 18, 1997, a reference to the April 14–16, 1997 incident in which Superintendent McLeod, upset over rumors (perceived to have been promoted by the Union) that he secretly was a member of the Union, said that if Sykes came over right then McLeod would “kick his ass.” Finding no such reference by Supervisor Dampier in the truck conversation with Suggs on April 18, 1997, I shall dismiss complaint paragraph 9(d) respecting the reference to McLeod. [As Suggs is not credited as to this, I need not address the Government’s creative reading of the allegation so as to encompass the supposed reference to McLeod.]

Turning now to the second item, and the remark which Supervisor Dampier acknowledges (although it includes “almost”), I find no violation. First, the evidence fails to show whether Suggs was aware of the unfair labor practice charge background of the incident. All Suggs knew is that a “ruckus” had occurred somewhere between the truck and the trailer, that Dampier, returning to the truck, told him that he and Thompson had argued over Thompson’s calling him a liar, and that Dampier had dared Thompson to call him a liar on that occasion. Had Thompson done so, Dampier told Suggs, Dampier would have kicked Thompson’s butt, and it almost would have been worth \$1000 to have “decked” Thompson.

So far as Suggs knew, Dampier and Thompson had an argument over Thompson’s having earlier called Dampier a liar (earlier occasion not specified or described to Suggs in the truck), that Dampier “bowed up” (3:390) on this occasion and dared Thompson to call him a liar on this occasion, and that it almost would have been worth \$1000 for Dampier to have been able to have “decked” Thompson.

Although the General Counsel grounds the alleged violation on “the effect of coercing the employee who hears the threat into dropping his Union activity lest he invoke the obvious wrath of the supervisor” (brief at 21), there is no connection here with Thompson’s union activity (or of his having filed a charge—a matter not alleged). And this is so even though,

crediting Suggs, I find that Dampier earlier had told Suggs that the person Samples Jr. was sending to help them, temporarily, seemed to be the “main instigator” of the Union. (3:569–570, 606–607). I do not credit Dampier’s version that he and Samples Jr. had not discussed, before Thompson’s arrival at Cedar Key, whether Thompson supported the Union. (5:1058). There was no reference to that, or to the Union generally, in the truck conversation. For all Suggs would have known, the “liar” dispute was some personal matter between Supervisor Dampier and electrician Daryl Thompson. And even if Suggs somehow was aware of union-related background of the dispute, there still would be no violation because Supervisor Dampier had only expressed what his desires would have been had Thompson again called him a liar. Thus, Dampier made no union-related threat of violence against Thompson under either alternative.

On these considerations, and the record, I shall dismiss complaint paragraph 9(d).

e. April 21, 1997

(1) Facts

Complaint paragraph 9(e) alleges that, about April 21, 1997 at Mid-State’s Cedar Key jobsite, Supervisor Dampier “threatened to blacklist employees and see to it that they never worked for non-union contractors again in Gainesville, Florida, in retaliation for employees’ union sympathies.” Mid-State denies. Stephen Suggs testified in support.

At the Cedar Key jobsite on Monday, April 21, 1997, following the April 18 election, Suggs testified, he told Supervisor Dampier that he was thinking of joining the Union, “to get his reaction.” [Recall that he actually had joined about a month before the election, but he had kept the fact of his joining secret. 3:586.] Dampier’s “reaction” was to say that Suggs would never work for Mid-State again. “For that matter,” Dampier continued, “you’ll never work for a nonunion contractor again because they’ll blackball you.” (3:585–586). On cross examination Suggs concedes that Dampier’s statement about his being blackballed dealt with action that contractors other than Mid-State would take, and that Dampier also spoke about other things as to why he did not think unions were any good. That Monday was Suggs’ last work day at Mid-State, for he quit his employment there. (3:600, Suggs).

Supervisor Dampier’s account is different. He asserts that Suggs told him he was thinking of joining the Union in order to make more money. [As the Union had just lost the election, Suggs’ statement implies that he would quit Mid-State and take a Union job at higher pay.] After all Suggs had seen [in the election campaign, presumably], Dampier told Suggs, Dampier did not think it was such a great option, but that was totally Suggs’ choice. Dampier denies any reference to blackballing.

Although that ended the remarks about joining the Union, Dampier proceeded to caution Suggs that Dampier would not recommend him for reemployment with Mid-State if he left without notice. As Suggs was “up for vacation,” Dampier suggested that Suggs work the next 2 weeks to complete the job, followed by his 2 weeks of vacation, and that he then turn in a quit notice. Then everything would be fine. The door would be open for him, and his bridge would be “unburned.” But the next day, Suggs called early to tell Dampier that he would be late for work, and not to pick him up. Suggs never returned to the job. Instead, he went later that day to the office

⁶ When citing Dampier’s version, whether at trial (5:1064) or on brief (Br. at 21), the General Counsel persists in omitting the “almost.”

and picked up his check. “I’ve never seen him again.” (5:1059–1062, Dampier).

(2) Discussion

Credibility resolutions are not always easy. Lying witnesses do not drop dead before my bench, as Ananias and Sapphira did at the feet of Peter. (Acts 5:1–11.) Indeed, resolution by the judge (or jury in a jury trial) is simply a practical solution, not a mark of truth absolute. I did not presume to caution either Suggs or Dampier, “Listen, the footsteps of those who have buried [Ananias] are at the door, and they will carry you out.” Even had I done so, nothing would have happened.

The dispute here could be resolved differently by different judges. But I give the edge to Supervisor Dampier on this matter. First, Suggs’ asserted purpose of getting Dampier’s “reaction” rang a bit hollow in the telling, as it does in the reading. Second, Dampier’s account, told well, fits the facts a bit neater than does Suggs’ version. Suggs’ account suggests that Dampier, here at the end of the organizing campaign, reacted the way a supervisor might react at the beginning of a campaign before he had been trained in the Do’s and Don’ts of a union campaign.

Moreover, it is undisputed that Suggs quit the next morning—apparently not long before the job ended. Dampier urged Suggs to help him until the job was completed, give notice, take his vacation, and all would be well with his record at Mid-State. This advice Suggs did not take. Suggs, I find, wanted to leave for more money then. He converted Dampier’s advice into a story of blacklisting. Finally, even if I were to credit Suggs, I would find no violation, for the allegation is that Dampier would take action to see that Suggs was blacklisted. Even under Suggs’ version, Dampier made no such threat—his attributed implication was that word of Suggs’ joining the Union would (naturally) circulate and contractors (on their own) would refuse to hire him. Assuming that it is unlawful for a supervisor to tell an employee that employers will not hire him if he joins a union, such is not the allegation here.

In any event, crediting Supervisor Dampier, I shall dismiss complaint paragraph 9(e).

E. Refusal to Consider or to Hire 18 Applicants

1. Introduction

a. General

On various dates from April 30, 1996 through January 21, 1997, complaint paragraph 10(a) alleges, Mid-State “has refused to consider for hire and/or to hire” 18 named job applicants because (paragraph 12(a) alleges) of union considerations. By its answer, Mid-State denies.

As set forth at paragraph 10(a), some of the employees applied on more than one date, and one, George Snowden, applied nearly a dozen times. Among the applicants were the paid (1:13–14, 17–18; 4:757, 808) representatives of the Union, Organizer Kenneth Sykes and Business Manager Harold Higginbotham. Beginning on the first date of April 30, Sykes applied on a half a dozen dates, and Higginbotham on three different occasions.

As argued in the General Counsel’s brief (Brief at 24–30), the Government’s attack theory essentially is that the rejection of applications from the 18, who openly wore union insignia or accompanied others who did, plus all the (alleged and unalleged) union animus, coupled with record evidence that Mid-

State was hiring “during the relevant period,” establishes a *prima facie* case.

The General Counsel also argues that Mid-State unlawfully discriminated because, by not interviewing the union applicants and accepting their applications, Mid-State “made it impossible for the Union applicants to be hired regardless of the availability of jobs.” (Brief at 28). To the unlikely extent this is a backdoor attempt to allege, as unlawful, Mid-State’s practice of not accepting applications until there is an opening, I shall not consider it because it was neither alleged nor litigated as a separate violation. However, I shall consider it as a contention that Mid-State’s practice of not “storehousing” applications is one component of Mid-State’s alleged effort to keep its workforce free of members of the Union.

Turning now to the asserted animus, I note that little remains of what is alleged in the complaint. The merit findings are, to some extent, technical insofar as animus is concerned. Thus, the no solicitation (admitted) and impression of surveillance findings hardly equate with a threat to close the plant or to discharge union supporters. And the one finding of a threat to close is based—not on a direct threat by President Samples, the owner—but on an expression of fear by Superintendent McLeod (an hourly paid supervisor; 6:1124) that Vice President Samples (who owns not one share of stock; 6:1101), would do so. Even the threat to sue, serious as it is, does not relate to clearly protected activities (of which Samples told the organizing committee they need have no concern; 2:138, 174–175), but to what Samples considered false and defamatory statements in the Union’s flyers. [Although an employer may sue for such, it is a gamble, for a loss will subject the employer to an unfair labor practice finding if a retaliatory motive is found. *Braun Electric Co.*, 324 NLRB 1 (1997). In short, the violations found here fall short of the animus showing needed by the General Counsel to do the heavy lifting respecting motivation.

That takes us to the critical inquiry—whether Mid-State, as the Government contends, was hiring nonunion applicants through the backdoor while closing the front door to anyone decorated with union insignia. “Backdoor” is a familiar concept to the Board, although the term itself usually is associated with an exclusive hiring hall of a union referring its friends rather than others who have lower numbers (higher positions) on the out of work list. For example, see *Operating Engineers Local 450 (Houston Chapter, AGC)*, 267 NLRB 775, 779 fn. 6, 795 fn. 88 (1983). Rather than backdooring, Mid-State counters, it simply was following its standard practices of not stockpiling applications (a waste of time because the applicants quickly find jobs elsewhere) and of interviewing and accepting applications only when there is an opening.

Before we turn to the sequence of attempted applications and the dates of actual hirings of those other than the alleged discriminatees (none of whom was hired), a brief detour is necessary concerning rebuttal testimony about an asserted 1995 incident.

b. The asserted 1995 “drawer” incident

Without objection that the testimony was not proper rebuttal (and should have been part of the Government’s case-in-chief effort to show disparity, as part of the proof of discrimination), Organizer Kenneth Sykes testified about a 1995 incident. On that occasion in the summer of 1995, Sykes accompanied Business Manager Higginbotham and member Ernie Cooper to

Mid-State's office. Higginbotham and Cooper were there to check on applications which they, reportedly, had left a few weeks earlier. Sykes was there to pick up an application for himself. (Sykes does not know whether Higginbotham and Cooper were told, on their earlier visit, that Mid-State was then hiring.) Brenda Thompson (the office manager) was handling the receptionist's duties at the time. Cooper said that he and Higginbotham had left applications earlier, knew that Mid-State was giving out applications, and wanted to check on their applications. Replying that Mid-State was not hiring and not giving out applications, Thompson went to a back office. Returning shortly, Thompson reported that Samples said he had their applications in his "drawer." On cross examination, Sykes expanded Thompson's report from Samples to add, "and that he was holding on to them." (6:1189-1191, 1195-1196). In their briefs the parties do not treat this "rebuttal" testimony of Sykes.

As the record shows, on a few occasions, a new receptionist has given out applications before management advised that Mid-State was hiring. In any event, contrasted with the asserted 1995 incident, all the other evidence, of which there is an abundance, is that Mid-State's standard practice, of many years' standing, was not to give out applications unless Mid-State was in a hiring mode. Past experience had demonstrated to Mid-State that applicants quickly find work elsewhere. Thus, it wastes time, space, and effort to receive and file, or "storehouse," applications on the prospect that the applicants will be available when a future need arises. (1:68-70; 6:1082, 1089, 1096, Samples; 5:896, 904, 916-917, 921, 930, 934, Thompson; 6:1105-1106, 1181, 1186, Samples Jr.).

[There is some confusion regarding whether, in September 1996, Mid-State instructed the receptionist to send applicants to Samples Jr. or to Samples for an interview once Mid-State was in a hiring mode. Samples testified in the affirmative. (1:72-73, 78). Vice President Brenda Thompson also says yes, but then states that such has always been the practice. (5:917-918). Samples Jr. asserts that, at least since he became general superintendent in July 1994, the practice has been the same as it is currently—if he needs someone, he tells the receptionist to let him know if an applicant arrives and then he interviews the applicant. (6:1180, 1182). It appears that whatever instruction was given in September 1996 merely reinforces the existing practice.]

Of the witnesses in this proceeding who had been hired by Mid-State, none testified to having been hired based on an application that had been "on file."

Turn now to the key. Near the end of Samples' direct examination, during Mid-State's case-in-defense, I asked him certain clarifying (for me) questions confirming that, if Mid-State is not hiring, it does not accept applications. Samples confirmed that he has no "drawer" in which applications are kept. (6:1089).

Through the General Counsel's cross examination, no question referred to a "drawer." Called as the Government's rebuttal witness, Sykes was asked about the 1995 incident, and, as described above, he reports a purported statement by Samples that he was keeping the applications of Higginbotham and E. Cooper in his "drawer." Of course, such evidence, if it existed, appropriately would have been offered during the Government's case-in-chief as part of the General Counsel's effort to show disparity (holding applications in 1995, but not when the Union mounts an organizing campaign), in order to help

carry the Government's burden of establishing a *prima facie* case of discrimination. [That is, a case sufficient to support a decision of merit in the event the respondent, failing in a motion to dismiss the complaint at the close of the Government's case-in-chief, were to rest on its motion rather than proceeding with its case-in-defense.]

In this light, it seems rather strange that the General Counsel, during the Government's case-in-chief, did not offer Sykes' testimony about the "drawer." Indeed, when Higginbotham was a witness for the General Counsel, he was not asked about the 1995 incident. The General Counsel was not shy about offering other pre-1996 "background," as is shown by the testimony of Michele DeBois, the 1994 receptionist.

I do not believe witness Sykes concerning this asserted 1995 incident. His testimony on this matter seemed contrived, and his demeanor was unfavorable. Rejecting Sykes' account of the entire 1995 "drawer" event, I find that it did not happen.

2. April 30-May 1, 1996

Shortly after the trial opened, the parties stipulated (1:20-22) to the authenticity of a 4-page exhibit (JX 1) listing the names of employees hired beginning April 30, 1996 [the date of the first alleged refusal to consider or to hire] through April 14, 1997, a date just 4 days before the April 18 election. [Recall that the last alleged refusal to consider or to hire occurred January 21, 1997.] Included in the other data on the exhibit are the dates of hire, for those who were hired, plus the names of the alleged discriminatees and the dates they applied.

The first 10-named discriminatees in complaint paragraph 10(a) applied over the 2-day period (six the first day and four the second) of April 30 to May 1, 1996.⁷ (JX 1 at 1). As of May 1, 1996, Mid-State was winding down a 2-year job at the Veterinary Medical School, and was not far from a mid-summer layoff when jobs at the Veterinary Medical School and the Medical Office Building ended on July 1. (6:1118-1122, 1138). The first person hired on or after April 30 was a journeyman, Anthony Baccili Jr., hired more than 2 weeks later — on May 17, 1996. (JX 1 at 1; 3:561, Baccili). Baccili first worked at the Medical Office Building which was nearing completion. (3:519, 531). For the (payroll) week ending Wednesday, May 1, 1996, Mid-State had, on its payroll, 17 journeymen and 19 helpers/laborers. (RX 17 at 1). Mid-State tries to maintain a 1 to 1 ratio of journeymen to helpers, Samples Jr. testified. (6:1137). [Samples testified similarly, although his testimony (1:96) is garbled in the record.] Brenda Thompson, a vice president and Mid-State's office manager (5:895), testified that she enters, into the company's computer, the employee's job classification based on the information shown on the payroll records. (5:914).

Samples Jr. testified that on April 30 and May 1, 1996, Mid-State had no need to hire anyone. (6:1142). Superintendent McLeod started the Physics building project (Physics) on February 15, 1996, was still there as of his October 1997 testimony, and testimonially reported a scheduled completion date of November 20, 1997. (5:939-940, 984, 999). Physics got off to a slow start. (6:1121, 1123, 1138). During the May-June time frame, only 4 to 5 persons were working at Physics.

⁷ The 10 names are: (April 1) Ernest Cooper, Randall Cooper, Kenneth Olsen, Jeff Richards, Joseph Suggs, and Ken Sykes; (May 1) Jeff Dennison, George Fetzer, Sam Vaughn, and Charles Wheeler.

(6:1123). McLeod testified that had the 10 alleged discriminatees been hired and placed at Physics, that there would have been no work for them to have done. (5:990–991).

Union Organizer Kenneth Sykes was in the group of six who attempted to apply for work on April 30. Most were wearing union insignia with some wearing a red or blue mesh logo cap (GCX 12) bearing the Union's logo. (2:304, R. Cooper; 4:798, J. Suggs; 4:811, Sykes). Of the applicants, Sykes principally spoke, although Joseph P. Suggs and Ernie Cooper also spoke. As summarized earlier, Sykes told the receptionist, who he recalls as being Kimberly Walton [as noted earlier, although Office Manager Thompson testified that Walton began work as a temporary about 2 months before her July 8 hire as a regular employee, it is possible that Walton was present as a temporary in late April], that they were looking for jobs. Walton said that Mid-State was not hiring. When Sykes asked if they could leave applications, Walton replied that Mid-State was not accepting applications, telephone numbers, or names. (4:811–812).

At that point Sykes said that they had heard from All Florida Electric that Mid-State had borrowed some employees. Because of that fact, Sykes explained, the group thought that Mid-State might be needing to hire some men. The receptionist (Walton) then left momentarily and returned with Samples Jr. and Leon Burgess, an estimator. When Sykes repeated his statement, Burgess (Randall L. Cooper specifically recalls that it was Burgess who replied, 2:309) said they had not borrowed anyone from All Florida, but that Perry Construction Company had hired All Florida to help finish the job. Either Burgess or Samples Jr., or both, said that Mid-State was not hiring. (2:314–316; 4:800, 813, 838–839).

[As Samples Jr. testified, Perry, the general contractor on the Veterinary Medical School job, had summarily notified Mid-State that Perry was hiring and placing some electricians on the job to get it finished. This was in early April. Mid-State had no choice but to accept the arrangement, for Perry controls some 50 percent of the business which Mid-State receives. In any event, Mid-State did not borrow any of All Florida's employees. (6:1109). Subjectively, Samples Jr. is correct in saying that Mid-State did not "borrow" any of All Florida's employees, especially if "borrowing" is defined in terms of a voluntary action. However, the effect of the event was the same as a borrowing, for, as Samples explained early in the trial (1:63–65), Perry told Samples and Samples Jr. that he would deduct the cost of the labor from Mid-State's contract by a change order. Still, that is a big difference in form from an actual "borrowing."]

As Randall Cooper credibly recounts, on cross-examination, Samples Jr. added that Mid-State was finishing up a job for the state, but Samples Jr. did not say which job. (2:314, 330). According to Sykes, he asked whether Mid-State had any work coming up in the future, and either Samples Jr. or Burgess, or both, said no. (4:813). Neither Cooper nor Joseph Suggs includes this final exchange in his account, and Samples Jr. does not address it. In light of the candid responses given by both Burgess and Samples Jr., I find it unlikely that either of them would have provided an answer of no future openings (as distinguished from no openings anticipated over the next few days). That makes no sense for a company with no plans of scaling back its operations. What happened, I find, is that Sykes, who has applied elsewhere, transported (through a memory mix-up) that exchange with some other employer into

this conversation. In short, the final exchange, as described by Sykes, did not occur.

A series of factors—Mid-State's lack of job openings in this late April-early May 1996 time frame, plus the relatively small size of its journeymen workforce (only 17 as of May 1) in comparison to the number of alleged discriminatees, and the fact that no journeyman (or any person) was hired for over 2 weeks after April 30 (Anthony Baccili Jr. on May 17, 1996)—prompts Mid-State (Brief at 18) to describe the current allegation as the "single most galling aspect of this litigation . . ."

As the evidence fails to show any discrimination respecting the dates of April 30-May 1, 1996 respecting the 10 who unsuccessfully sought to apply for work at Mid-State, I shall dismiss complaint 10(a) as to the 10 for those dates.

3. May 16, 1996

As alleged by complaint paragraph 10(a), the next visit to Mid-State by alleged discriminatees was by Harold Higginbotham and Nelson L. Mathis Jr. on May 16. Mathis, president of IBEW Local 1205 (2:357), and Business Manager Higginbotham so confirm. (2:358; 4:758, 773). Mathis was wearing a Union T-shirt and Union ball cap, or logo cap (2:358), and Higginbotham a white Union logo cap (4:759). Of the two, Higginbotham did most of the talking. Higginbotham asked the receptionist if they were taking applications. She said no. Higginbotham said that they worked out of the Union's hiring hall, were looking for jobs, and had heard that Mid-State was hiring. The receptionist said that Mid-State was not hiring and anticipated no hiring for another 3 to 4 weeks. To Higginbotham's inquiry, she said they could not leave applications or their phone numbers. (4:760, 767, 773).

Mathis recalls that Higginbotham asked if Mid-State was hiring "journeyman wiremen." When the receptionist said no, Higginbotham asked if they were hiring anyone, and again she said no. Mathis then asked if they could complete applications, and she said no. He asked if Mid-State was taking applications, and she said no. The answer also was no to his question of whether she would take their names and addresses. (2:358–360). Mathis' account does not include any statement by the receptionist of no anticipated hiring for the next 3 to 4 weeks.

The next day, May 17, 1996, Mid-State hired Anthony Baccili Jr. as a journeyman. (JX 1 at 1). Samples Jr. testified that, on May 17, he had attended a job meeting that morning at the Medical Office Building jobsite. At the meeting he learned there were some telephone conduits that had to be installed for each office suite. When Samples Jr. returned to his office, Baccili was there, and Samples Jr. hired him. (6:1142–1143). Samples Jr. testified that, on that occasion, he was unaware that either Higginbotham or Mathis had been to the office the preceding day seeking employment, and before May 17 Samples Jr. had not instructed the receptionist to begin taking applications. (6:1193). Samples Jr.'s testimony suggests that, somehow, the telephone conduits were unanticipated before the May 17 job meeting. The topic was not covered on cross examination.

Baccili confirms his hiring by Samples Jr. and that his initial assignment was installing conduit for the telephone system. (3:519, 532). Although such is not typically done toward the end of a job, as here, the work "was more or less left out because they didn't know really what they wanted to do yet."

Even then it took a week before the general contractor knew "exactly" how he want the work done. (3:532, Baccili). In short, Baccili supports Samples Jr.'s testimony.

Finding that the need for a new journeyman (at least as to the date or even week) had not been anticipated by Mid-State as of May 16, and that, consistent with Mid-State's established practice of taking no applications until there is a need, or opening, as was the case with Baccili's hiring on May 17, I find no discrimination as to Harold Higginbotham and Nelson Mathis, and I shall dismiss complaint paragraph 10(a) as to them for the date of May 16, 1996.

4. June 19, 1996

The only name listed in complaint paragraph 10(a) for June 19 is that of George Snowden. Before Snowden visited Mid-State on June 19 (JX 1 at 1), wearing one (GCX 12) of the red IBEW Local 1205 mesh logo caps (4:647-648), Mid-State had hired Zot Szurgot on June 13, whom it classified as a journeyman, and Steven James, whom it classified as a helper. (JX 1 at 1; JX 3 at 1). Szurgot was laid off on July 1 (JX 1 at 1) when the City Hall job he was working on neared completion and not as many electricians were needed. (3:419, 436-437, Szurgot). Samples Jr. testified that Szurgot had been hired as both an accommodation to another employer, Carlos Hope Electric, which was trying to find a place for him when its work had slowed, and to help finish Mid-State's work on the City Hall job. (6:1122, 1140, 1143-1144, 1172, 1178-1179).

When he visited Mid-State's office on June 19, Snowden testified (4:649-651), he told the receptionist, Kim Walton, that he was looking for a job. Walton said that Mid-State was not taking any applications or telephone numbers. However, Walton said that Snowden could speak with Samples. In Samples' office, Snowden said that he could not understand why he had not been hired, for he had been visiting the office for 8 or 10 weeks, and he had heard that Mid-State had been hiring. [That Snowden (4:641, 647) sent a two-paragraph letter, dated June 19, 1996 (GCX 11), to Samples reciting essentially this same complaint, and requesting a meeting, raises some question whether the two met on June 19 or later. Samples confirms that they met on one occasion. (6:1087). I treat the matter as a meeting on or about June 19.] According to Snowden, Samples said that he had not hired anyone else, and was laying off people. Samples did not say that Snowden was ineligible for employment with Mid-State. (4:651).

Samples testified that Snowden is not eligible for employment with Mid-State. Snowden is ineligible because Snowden's former employer, Jack H. Oliver, president and owner of Pro Electric Company (1:59; 5:1037), in an early 1996 private sharing of names and information about workers, advised Samples that he earlier had fired Snowden for walking off a job and, reportedly, going to a bar, and that Snowden was unreliable. (1:58-59, Samples). Oliver corroborates. (5:1040, 1043-1044). When he met with Snowden, on or about June 19 (as I state earlier), Samples did not divulge what Oliver had told him in confidence. (6:1087). Samples Jr. confirms that Snowden is ineligible because President Samples has declared it that way. (6:1146-1147).

Snowden confirms that he had been fired from Pro Electric, ostensibly for leaving early but really, he assertedly was told when picking up his check, it was because he was too old. (4:640; 5:886-888). [Snowden, 65 (4:676), concedes that the

EEOC dismissed his charge of age discrimination which he filed against Pro Electric. (5:5:888).]

The next three persons hired by Mid-State were David Byrne on July 30, Roy Sullivan on August 1, and Gregory Dunagan on September 7, 1996. (JX 1 at 1-2). Mid-State classified Byrne and Sullivan as laborers at, respectively, \$6.55 and \$6, and Dunagan as a helper at \$7. Snowden has 41 years' experience as an electrician. (4:638). Mid-State did not hire its next journeyman until it hired James Powell on September 10. (JX 1 at 2: 3:443; 6:1144-1145).

Crediting Samples, Oliver, and Samples Jr. on this matter, as I do, I find no merit respecting the alleged date of June 19, 1996. Indeed, because Samples had declared Snowden ineligible, for a reason unrelated to any union considerations, I find no merit to any of the other dates which are tied to the 8(a)(3) allegation. Accordingly, I shall dismiss complaint paragraph 10(a) as to George Snowden for all 11 dates listed (June 19 to December 4, 1996). As we see later, additional dates in December 1996 and January 1997, pertaining to Sykes and to Snowden, are covered by complaint paragraphs 10(b) and (c).

5. August 5, 1996

Aside from listing the name of George Snowden for August 5, complaint paragraph 10(a) names only Jeff Richards for the date of August 5. Richards did not testify. On August 5, Snowden testified, a Jeff Richardson accompanied him to Mid-State's office. There were wearing Union logo caps. Snowden told Kimberly Walton, the receptionist, that they were looking for work. She said that Mid-State had no work and was not taking applications or telephone numbers. (4:655-656). On cross examination, Snowden confirmed (5:891) the accuracy of a short, typed statement, signed by Jeff Richards, and dated August 5, 1996, the text of which reads (RX 14):

George Snowden and I (Jeff Richards) went to Mid-State Electric to look for work. The secretary told us that they were not hiring at this time and that we would have to talk to Mr. Bill Samples.

Mr. Samples is out of town to attend a death in the family and will be back tomorrow.

The secretary also told us that work is slow and that they do not know when they will be hiring!

George asked if they had been doing any hiring lately and was told, No.

The other secretary jumped in and told us that they were not taking any phone numbers either.

Snowden also testified that the "secretary" said that Mid-State was not hiring, that they had not been hiring the last month. (5:893). Assuming that Walton, or the "secretary" said there had been no hiring for the past month, such a statement is accurate as to any journeymen. Only two laborers had been hired recently (David Byrne and Roy Sullivan), as noted earlier. And the next person hired was helper Gregory Dunagan on September 7. (JX 1 at 2). The record gives no information about Richards or his training or experience, if any, as an electrician or even as a helper or a laborer. In any event, a preponderance of the evidence fails to show any discrimination against Jeff Richards. Accordingly, I shall dismiss complaint paragraph 10(a) as to Jeff Richards for the date of August 5, 1996.

6. August 9, 1996

The next date alleged is that of August 9, and it is for Kenneth Sykes, Curtis Davis, and Doug Sullivan. [George Snowden also is listed, but I have dismissed complaint paragraph 10(a) for all dates as to him.] Sykes testified that he was one of several persons who went to Mid-State on August 9 seeking jobs. Just he and the person who rode with him (possibly Snowden) went is at the time. The receptionist told him that Mid-State was not hiring and not taking applications or telephone numbers. She also said that he would have to talk to Samples Jr., but that he was on vacation. (4:814–816, 841). Snowden essentially confirms. (4:657). Davis did not testify, although the joint exhibit reflects that a “C. Davis” attempted to apply at Mid-State on August 9. (JX 1 at 2). Doug Sullivan testified that he was wearing a Union cap when he went with Sykes and two or three others to Mid-State. Notwithstanding the confusion as to who accompanied Sykes into the office, Sullivan’s version of what was said essentially confirms Sykes. (3:487–488, 492–495).

Mid-State had laid off four electricians on July 1—Jaimie Veatch, Zot Szurgot, Ron Travis, and Steven James—when the Veterinary Medical School and the Medical Office Building projects closed out. (6:1121–1122, 1138). Thereafter, Physics was the only multiperson job, with nearly all others being two-person jobs (one journeyman and one helper). (6:1138–1141). After Szurgot was hired, all journeymen hired, during the relevant time, went to Physics. (6:1148–1149). As no discrimination has been shown respecting the date of August 9, I shall dismiss complaint paragraph 10(a) as to Ken Sykes, Curtis Davis, and Doug Sullivan respecting August 9, 1996.

7. August 23, 1996

The next date, August 23, is alleged respecting Kenneth Sykes and Harold Higginbotham [plus George Snowden].

Business Manager Higginbotham testified that the trio went to Mid-State, wearing Union hats and T-shirts, and that Sykes spoke, telling the receptionist that they were there seeking employment and asking if Mid-State was hiring. When the receptionist said no, Sykes asked whether they could fill out applications. She said they were not accepting applications. The answer also was no respecting telephone numbers and on Sykes’ leaving his business card. Sykes said thank you, and they left. (4:767–769, 790). Identifying the receptionist as Kimberly Walton, Sykes testified to the same effect (4:816–818) as did Snowden (4:658–660).

As mentioned earlier, the next journeyman which Mid-State hired was James Powell on September 10, 1996. (JX 1 at 2; 6:1144). Samples Jr. testified that, as of August 23, there was no way he could have predicted that he would need anyone on September 9. (6:1144). Finding no discrimination, from a preponderance of the evidence, I shall dismiss complaint paragraph 10(a) as to Ken Sykes and Harold Higginbotham for the date of August 23, 1996.

8. September 6, 1996

a. Facts

Two names are listed in complaint paragraph 10(a) for September 6. They are Randall Cooper and Kenneth Sykes.

Randall Cooper (2:324–325, 327) and Kenneth Sykes (4:818, 847) agree that, on September 6, 1996, Cooper went with Sykes to Mid-State’s office where they spoke with Samples and Samples Jr. According to Sykes, he told Kimberly

Walton, the receptionist, that they were there looking for a job. She told them to have a seat. Before she had time to go for the Samples, Sykes could hear them talking as they were walking toward the lobby. (4:818, 851). Cooper recalls no receptionist present, and that he and Sykes waited in the lobby a few minutes until the Samples walked into the lobby. (2:325).

According to Sykes, he and Cooper heard the approaching Samples talking about having hired the “cream of the crop,” and they were discussing what the starting pay rate should be. (4:819). Cooper does not describe any such activity. According to Sykes, when the Samples came into the lobby, Sykes commented to them about their having hired some electricians. Samples said no, that they had hired some apprentices. Samples Jr. said that S&S Electric had an Audette in the paper, that they (S&S) may be hiring, and “you might give them a call.” Sykes thanked them and he and Cooper left. On cross examination, Sykes concedes that in his pretrial affidavit he recorded that Samples said they “were looking for apprentices.” Sykes quickly adds that Samples also said that they had hired some apprentices and that Samples Jr. had added that S&S Electric (a nonunion contractor) was running an ad in the newspaper. Sykes insists that, “Every time I applied, I said that I was looking for a job.” Although, on this occasion, Sykes did not volunteer to take a job as an apprentice, “I told him I was there looking for a job.” (4:820–821, 847–851). Respecting S&S Electric, Sykes asserts that he thought Samples Jr. said that merely as a “dig.” In any event, Sykes did not check a newspaper and never went to S&S even though, he concedes, it would be a target for organizing. (4:832–833).

Cooper’s version is rather different. He testified that Sykes asked whether they were accepting applications or hiring. Samples said they were not hiring or accepting applications for journeymen, but that they were looking for apprentices. Neither Sykes nor Cooper asked to be considered for apprentice positions. (2:325–330). Asked when the last time was that he had worked for apprentice wages, Cooper (who has been working in the trade about 25 years, 2:303) replied, “When I was an apprentice.” (2:330).

Samples, who has known Sykes for many years (1:80), testified that Sykes never came by when Mid-State was hiring and that he had never asked for a job. (1:55). Samples recalls when Cooper and Sykes came by together. Samples told them that he was not hiring journeymen, but was trying to hire a few apprentices. Neither Sykes nor Cooper asked to apply for such. (6:1085, 1093–1094).

Samples Jr. testified that on (Monday) September 9 Harry Tindell, a supervisor with Doyle Electric (an open shop contractor) called, asking if Mid-State had room for a couple of persons (James Powell and David Kelly) whom Doyle Electric was about to lay off for lack of work. As an area had just opened on a job the previous week, Samples Jr. told them to send them over for an interview. Samples Jr. hired both, with Powell starting on (Tuesday) September 10 and Kelly on September 16, 1996. (6:1144–1145, 1173–1174, 1179). Mid-State classified Powell as a journeyman and Kelly as a helper. (JX 1 at 2). James Bryant was the next journeyman hired, and his first day on the payroll was September 17. He apparently went to the same job where James Powell was assigned. (6:1145; JX 1 at 2). Powell confirms that he was interviewed by both Samples and Samples Jr. on September 9 before he was offered a job with Mid-State. He wore no Union insignia and nothing was said about a union. Powell worked for Mid-

State until February 1997. In fact, it was not until about May 1997 that he joined the Union. Powell's first assignment at Physics was to add conduit ("piping") in the labs. In his opinion, it was a logical time to assign an electrician to begin that work. (3:443-449, 478, 480-481, 484).

b. Discussion

Samples Jr. was not asked whether, when Doyle Electric called him on Monday, September 9, about James Powell, he also considered Randall Cooper and Kenneth Sykes who had just spoken with both Samples and Samples Jr. the previous Friday, September 6. Recall that Samples Jr. testified that the new area had opened at Physics the same week as the September 6 visit by Cooper and Sykes. Samples Jr. was not asked why he was receptive to a call (from a nonunion contractor) on Monday, September 9, but, just one business day earlier (through Samples) had told Cooper and Sykes that Mid-State was not hiring. (The credible evidence shows that Sykes asked only whether Mid-State was hiring or taking applications. Even so, I find that to be sufficient to express a request for an application and to have considered any such application that is completed and submitted.)

As the record has no evidence as to the foregoing, the evidence simply shows that, when Samples Jr. decided to begin interviewing (that is, when Doyle Electric called on September 9), the only journeyman applying was James Powell. Unfortunately for Cooper and Sykes, they did not appear between the time of Doyle Electric's call, and the appearance of Powell at Mid-State to be interviewed. Had they done so, they would have fit squarely into the time period which Samples Jr. had just opened for hiring interviews.

As the questions posed to Samples Jr. did not test him concerning whether, on September 9, he thought of Cooper and Sykes, but rejected them from any consideration (and for what reason), the evidence fails to show any discrimination by Mid-State on September 9 against either Randall Cooper or Kenneth Sykes. I therefore shall dismiss complaint paragraph 10(a) as to Randall Cooper and Kenneth Sykes respecting the date of September 9, 1996.

9. October 10, 1996

The next date alleged in complaint paragraph 10(a) is October 10, 1996—it is for the names of Kenneth Sykes and Harold Higginbotham (and George Snowden).

Higginbotham (4:769-770) and Sykes testified that, the morning of October 10, they and Snowden drove to Mid-State in one of the Union's vehicles. Snowden asserts that he went there alone. (4:663-664). Higginbotham testified that Sykes spoke to receptionist Kimberly (Walton) for the trio. (4:770-771). Snowden states that he spoke to Walton. (4:664). Sykes testified that he told Walton that they were looking for a job. (4:821-822). Snowden told her he was looking for a job as an electrician. (4:664). Walton said Mid-State was not hiring and not taking applications or phone numbers. (4:664, 771, 821-822). According to Snowden, he asked Walton if Mid-State had hired anyone in the last month. She said no. (4:664). Each of the three was wearing at least one of the mesh caps bearing the Union's logo (4:664, 821), and Higginbotham (4:770) asserts that the other two also were wearing Union shirts.

As the hiring list reflects, Walton's statement to Snowden—who acknowledges that he was looking for work as an "elec-

trician" (that is, as a journeyman)—was almost correct in terms of journeymen, for the last journeymen hired were James Bryant on September 17 and James Powell on September 10. (JX 1 at 2). Between Powell's September 10 hiring, and the October 10 visit of Sykes, Higginbotham, and Snowden, five helpers and two laborers were hired. (JX 1 at 2). As journeymen, Powell was hired at the hourly rate of \$9 and Bryant at \$9.50. The laborers and helpers ranged from \$5.50 (the two laborers) to \$8 (helpers \$6.25 to \$8). (JX 1 at 2).

Actually, the record is a bit ambiguous concerning wage rates and classifications. Joint Exhibit 1 does not expressly list a wage-rate range for each classification. Indeed, while JX 1 implies that journeymen rates, during the relevant time of April 1996 to April 1997 started at \$9 an hour, two of the 22 helpers hired during that time were hired at rates at or above the \$9 level—Larry Polk II at \$9 and Jose Ayala at \$9.50. (JX 1 at 3). And Zot Szurgot, classified as a journeyman, was hired June 13, 1996 at \$8.50. (JX 1 at 1). But these appear to be aberrations in an otherwise consistent pattern of hiring within dollar ranges for the stated classifications. Additionally, however, Samples testified that, during this time, helpers started at \$7 to \$9.50, with the wage scale for a journeyman being \$11 to \$12.50 per hour. (1:77). That leaves the numbers between \$9.50 and \$11 rather unclear.

Although Mid-State's classification of journeyman generally is for those licensed by some governmental authority, such as the City of Gainesville or Washington County [west Florida], Mid-State treats as journeymen those persons who have many years of experience but no license, Samples testified. (1:76). Helpers are those with some electrical experience, and laborers are persons with no electrical experience. (1:76). In short, while the General Counsel argues (Brief at 30) that the names on the hiring list should be considered without distinction between the journeyman and helper classifications, there is little basis for that. Other than the examples of Polk II, Ayala, and Szurgot, the other names and rates appear consistent with Mid-State's classification system.

Moreover, Samples (1:77-78) and Samples Jr. (6:1137) testified that Mid-State does not hire a journeyman and place him in a helper position because it would be demeaning, the person would not be happy, and he soon would leave for better pay. Accordingly, Mid-State implies that it did not consider journeymen Sykes and Higginbotham for helper positions for which Joseph Carbonell was hired (at \$7.50) on October 14 and Douglas Howard was hired on October 15 (JX 1 at 2) at \$6.50 (JX 3 at 9; 2:238).

The next journeyman hired was James G. Campbell, on October 24. He was followed by Albert Palmieri on October 25. (JX 1 at 3). Samples Jr. testified that work opened up at that time for the hiring of Campbell and Palmieri. (6:1146). Samples Jr. testified similarly respecting the hiring of journeymen David Wood on November 1, John Ulmer Jr. on November 6, William Sullivan on November 19, and Larry Polk on November 26. (6:1149-1151; JX 1 at 3). There is no evidence that Mid-State knew, when Sykes and Higginbotham applied [I exclude the ineligible Snowden], on October 10 that it would need to hire six journeymen from 2 to 6 weeks later. Indeed, Sykes concedes that there is a "constant" fluctuation in the hiring needs of an employer in the construction industry. (4:851-852). As Higginbotham, the Union's chief officer,

colorfully puts it, that constant fluctuation is the “beast” of the construction industry. (4:786).

William R. Sullivan actually was a rehire. (3:377, 379; 5:989; 6:1077). Sullivan testified that when he left Mid-State in November 1993 he was told he would be welcome to return. (3:411). When Sullivan, then working for Doyle Electric, was on a business visit to the Mid-State job trailer at Physics in September 1996, Samples Jr. told him to come by when his work was done at Doyle and Mid-State would put him to work if work was available. (3:380–382). Sullivan acknowledges that it is traditional for open shop contractors to rehire employees who had a good record with the rehiring company. (3:411–412). Sullivan was not wearing any union insignia in September, or in November when he was rehired by Mid-State, and he did not join the Union until March 1997. (3:410). Counting his electrical experience in the U.S. Navy, by November 1996 Sullivan had some 9 years’ electrical experience, but no journeyman’s license. (3:377, 387–388, 405). At Doyle Electric Sullivan had worked up to a position as a working foreman. (3:406). Thus, Sullivan’s rehiring by Mid-State at the journeyman rate of \$10.50 (JX 1 at 3) does not seem unusual or suspicious.

Finding that the record falls far short of showing, by a preponderance of the evidence, that Mid-State unlawfully failed to consider journeymen Kenneth Sykes and Harold Higginbotham for the journeymen openings filled by James Campbell and Albert Palmieri on October 24 and 25, or for the journeyman jobs that opened, and were filled, later in October and November, I shall dismiss complaint paragraph 10(a) as to them for the date of October 10, 1996.

10. December 4, 1996

The next date alleged in complaint paragraph 10(a) is that of December 4, 1996, with two names listed—Kenneth Sykes and George Snowden. Although I have dismissed Snowden as to all dates for complaint paragraph 10(a), I consider his testimony to the extent it is pertinent or credible in understanding events.

On this occasion, Sykes testified, he told the receptionist, Kimberly Walton, that they were there looking for “a job.” (4:823). Snowden asserts that Sykes told Walton they were “looking for work as electricians.” Walton replied, “We’re not hiring, we do not take applications, and we do not take phone numbers.” (4:666). Although Snowden recalls that as the day Walton refused to accept Sykes’ business card (4:666), both Higginbotham (4:769) and Sykes (4:817–818), as earlier mentioned, designate the visit of August 23 as the when the business-card incident occurred. Sykes asserts that Walton said that they needed to talk to Samples Jr. who was on a job, that he would be back in an hour, and they could call then. An hour later Sykes called, but Walton said Samples Jr. had gone home for the day. (4:824).

The next journeyman hired was Donald Clipp, on December 31 at \$11 (JX 1 at 3), for work in the auditorium and lecture hall area (of Physics) that had just opened. Samples Jr. testified that he did not know on December 4 that he would need to hire someone at the end of the month. (6:1151). Superintendent McLeod testified that he received just one day’s notice that the area would open. (5:989–990). In fact, McLeod normally received only 1 to 2 days’ notice from the project coordinator that an area would open. (5:983–984, 988, 1001–1002).

Finding no merit to this allegation, I shall dismiss complaint paragraph 10(a) as to Kenneth Sykes for December 4, 1996.

11. December 6, 1996

The next date, December 6, 1996, appears in complaint paragraph 10(b) as to Kenneth Sykes and in complaint paragraph 10(c) respecting George Snowden. As the refusal to hire based on this event not only is alleged as a violation of Section 8(a)(3) of the Act, but also 8(a)(4), I summarize this matter under the topic for discrimination based on NLRB charges filed.

12. January 8, 1997

Complaint paragraph 10(a) lists one name for this date, that of Shane Veatch. Veatch previously had worked for Mid-State as an “electrician,” for about \$8.50 per hour, for about 3 months, departing about May 1996. (2:345).

On this date of January 8, Veatch accompanied George Snowden to Mid-State, with both openly wearing union insignia and union apparel with the Union’s logo. (2:334–335, Veatch; 4:669–670, Snowden). Veatch testified that he asked for a job application and was told that they needed to speak to Samples Jr. about jobs, that he had just left, that Mid-State was not hiring and was not taking any applications. (2:336–337, 348–349). Snowden adds that the receptionist, Kimberly (Walton), also said that Mid-State does not take phone numbers. (4:670). [I address January 8 as to Snowden when I cover the alleged violation of Section 8(a)(4).] From my own observation, Veatch describes Office Manager Brenda Thompson rather than Walton. (2:337). As of the trial, Walton was just 21 with brown hair. (4:653; 5:931).

The first person hired on or after January 8 was Darryl Thompson on January 20, at \$9 (JX 1 at 4) apparently as a journeyman, although JX 1 is blank as to his classification. (2:135, 195).

Conveniently, the General Counsel fails to brief as to Veatch. I say “conveniently” because, by not addressing the allegation, the Government does not have to present an argument. Actually, the General Counsel should have moved to withdraw the allegation as to Veatch when the General Counsel rested, certainly so by the close of the trial, and at the very latest in the Government’s brief. At no point has he done so.

Veatch, you see, left in May 1996 because he was fired by Samples Jr. Veatch so admits (2:346, 350), and Samples Jr. confirms (6:1152). Samples Jr. testified that he had fired Veatch because Veatch, who had been working at the Medical Office Building project but recently had been sent to work at Physics, had simply reassigned himself back to the medical office job. Samples Jr. asserts that Veatch is not eligible for rehire. (6:1151–1152).

The reasons the General Counsel should have moved to withdraw this allegation are threefold. First, Veatch admits he reassigned himself in May 1996, and that Samples Jr. fired him for this conduct. (2:350–351, 355–356). Second, Veatch concedes (2:351) that he had not so much as thought about the Union as of the time, so he had not shown any open support of the Union. Three, as earlier as the first day of trial, FRE 611(c) witness Samples advised (1:60) that Veatch was ineligible for rehire at Mid-State. While most would sympathize with Veatch for his reason of desiring a reassignment (to be nearby so he could visit his wife who, at the time, was making frequent trips to the hospital next door for her personal care), the proper course would have been to have sought a reassign-

ment for that family reason, not to unilaterally reassign himself.

Finding no evidence whatsoever in support of the Government's allegation, I shall dismiss complaint paragraph 10(a) respecting Shane Veatch for January 8, 1972.

13. January 21, 1997

The final date and names alleged in complaint paragraph 10(a) are for Steve Aldrich and J. H. Weeks for January 21, 1997. "This was," the General Counsel observes (Brief at 29), "the same day that Richard Messer was hired" as a helper at \$8 per hour. (JX 1 at 4). The following day, January 22, Gary Bloodworth was hired as a helper at \$8.25, and on January 28 Joseph Burlingame was hired as a helper at \$7.50 per hour. (JX 1 at 4). Finally in January, Mark Poucher was rehired a journeyman at \$10 on January 29. (6:1077; JX 1 at 4).

Julian Henry Weeks, who appears to be about 62, holds a journeymen electrician license from the City of Gainesville and also one from Alachua County (Florida). He has worked for 33 years in the electrical trade, and has been a member of the Union for 32 years. (2:198-199).

On January 21 Weeks went to Mid-State along with Kenneth Sykes and Steve Aldrich in Sykes' vehicle. All three were wearing Union-logo caps. As they drove into the parking lot, Weeks observed Samples by his vehicle some 20 to 40 feet away talking to someone. Samples looked at the trio, then Samples and the other man "walked around," got in their vehicle, and left. Although Weeks knows Samples, he is uncertain whether Samples would recognize him. (2:200-202, 209-210). Weeks, Sykes, and Aldrich then went inside and asked a young woman if Mid-State was taking applications. She said Mid-State was not hiring and not taking applications. Weeks has not returned to Mid-State. (2:202, 207). Although Weeks claims (2:204) he would have accepted a helper's position in order to work as a salt (open) because that would benefit all members of the Union he concedes (2:205-206) that the last time he worked in the electrical field as something other than a journeyman was when he worked as an apprentice some 32 to 33 years earlier. [The transcript, at 2:206:1-2 is garbled, reflecting 2 or 3 years earlier when he worked as an apprentice.] As his apprenticeship no doubt lasted about 4 years, the correct time reference would be closer to 28 or 29 years since he had worked as, in effect, a helper.

With 33 years of experience and being a licensed journeyman, it is extremely unlikely that Weeks would be content, for whatever purpose, of working very long as a helper (even assuming he would be able to do the ditch digging and other strenuous work helpers do). Appearing to be about 62, and with his white hair and distinguished appearance, Weeks was not at all persuasive in his testimony about his willingness to work as a helper—beyond a possible 1 or 2 day stint just to be hired as a helper. Thus, I do not credit his testimony to the extent he asserts a good faith intent to apply to work as a helper for anything beyond 1 to 2 days. Also, recall the testimony of Samples (1:77-78) and Samples Jr. (6:1137) that Mid-State does not hire a journeyman [especially a licensed journeyman with 33 years' experience] for a helper's position.

As he drove into the parking lot that day with Aldrich and Weeks, Sykes testified, Samples and Samples Jr. were standing by a white vehicle. The two Samples looked right at the Sykes trio, and then the two Samples hurriedly got into their vehicle and drove off before Sykes could park. This action

surprised Sykes, for he knows both Samples, and he and Samples Jr. had worked together as journeymen back in the 1970s. (4:825-827, 837-838). Sykes concedes that in the four or five conversations he had with Samples or Samples Jr., or both together, the Samples were always at least cordial. (4:833-836).

Samples does not recall ever seeing Aldrich or Weeks on any visit by them to Mid-State (1:60), nor does he recall any parking lot incident and hurrying to leave to avoid having to meet with Kenneth Sykes. (6:1086). Samples Jr. (1:156) denies that any such incident occurred where he ran to his vehicle to avoid seeing (meeting with) Sykes.

Respecting Mark Poucher, the journeyman rehired on January 29, Samples Jr. credibly testified that Poucher was an excellent employee who was given preferential hiring because Samples Jr. knew him to be a reliable worker. (6:1153). Recall that former employees, with good records, are given such preferred hiring status under Mid-State's unwritten policy. (1:94, 97, Samples; 6:1136-1137, 1185, Samples Jr.). [Samples' response at 1:94:19-20 is garbled, and should read, "Well, let's say that they're good people, we give them preference." My notes so reflect, and the question and answer which follow that one confirm this. Transcript volume 1 has several such errors. Most are understandable from the context.]

The parties provide almost no briefing on this specific allegation. The General Counsel (Brief at 29) refers to helpers Messer and Bloodworth who were hired that day (January 21) and the next, and Mid-State (who ignores the helpers in all these allegations) cites (Brief at 22) the fact that Poucher was a rehire.

Crediting the composite version of Sykes and Weeks, I find that the parking incident occurred, but it was much more subdued (as Weeks describes, 2:201-202) than the near-running attributed by Sykes to the Samples. Even so, I find that Samples and Samples Jr. recognized Sykes, but not Weeks and Aldrich. That means nothing, however, because the Samples, who obviously were about to leave anyhow, were under no obligation to remain and meet with Sykes. Indeed, by Sykes' own description, in the office he did not leave a request for an appointment to meet with either of the Samples respecting being hired. In any event, under Mid-State's policy, Sykes, as a journeyman, was not eligible for hire as a helper, and there is no evidence that Mid-State, as of January 21, was aware it would need to hire a journeyman on January 29, the date it hired Mark Poucher as a journeyman.

There being insufficient evidence of any unlawful motive on Mid-State's part respecting this allegation, I shall dismiss complaint 10(a) as to Steve Aldrich and J. H. Weeks for January 21, 1997. (I postpone my conclusion as to Sykes until I reach complaint paragraph 10(b), the allegation about discrimination because of NLRB charges.)

Having considered and dismissed each component of complaint paragraph 10(a), I now dismiss complaint paragraph 10(a) in its entirety.

F. Discrimination Because of NLRB Charges Filed

1. Introduction

Complaint paragraph 10(b) alleges that Mid-State, since about December 6, 1996 and January 21, 1997, "has refused to consider for hire an/or to hire Ken Sykes." Mid-State denies.

Since about December 6, 1996 and January 8, 1997," complaint paragraph 10(c) alleges, Mid-State "has refused to con-

sider for hire and/or to hire George Snowden.” Mid-State denies.

Additional paragraphs allege that Mid-State, by such conduct, violated both Section 8(a)(3) and Section 8(a)(4) of the Act. Mid-State denies. As mentioned earlier, I postponed covering some of this until now.

2. December 6, 1996

a. Facts

On December 6, Sykes testified, he and George Snowden drove to Mid-State in Sykes’ truck. Sykes told the receptionist, Kimberly Walton, that he and Snowden were looking for jobs and would like to talk to one of the Samples. After Walton left and returned, she escorted Sykes and Snowden to the office of Samples. As they were about to enter, Samples Jr., who had been in the office with Samples, left. The three who then remained were Samples, Sykes, and Snowden. (4:824–825, 833–834). Snowden’s account is consistent. (4:667–668).

Samples asked how he could help them, and Sykes said they were looking for jobs. To this Samples replied that he could not hire them, or anyone, because “we had charges filed against him.” Sykes asked if Samples would like to meet with Harold Higginbotham to see if they could resolve their differences. Samples said he was not interested in speaking with anyone, and that he wanted to let the NLRB run its course. He said the NLRB was to have made a decision on the charges some 3 days earlier, but some amended charges had been filed, that he did not know how to respond to the amended charges, and that he had written the NLRB’s Regional Office for clarification.⁸ [Samples apparently was representing Mid-State himself at that time. Attorney Sizemore’s name does not show up in the formal papers until April 1997. GCX 1(ff).] Sykes and Snowden thanked Samples and left. The conversation lasted some 5 to 10 minutes, and Samples had been cordial and courteous. Samples did not mention that he was attempting to settle the case with the NLRB. (4:825, 834; 6:1191–1192). Snowden generally supports Sykes, but his account has no “because we had filed charges.” Instead, he asserts that Samples said he would not do any hiring until the charges against him were resolved. (4:668–669; 5:889–890).

Acknowledging the conversation (1:81, 95–96; 6:1080–1081, 1090–1091), Samples’ version is different. He asserts that he told Sykes, who asked if Mid-State was hiring (1:81) and who, of the two visitors, did the talking (1:96), that Mid-State was not hiring because charges were pending. He said he had made a written proposal to the NLRB to resolve the charges by offering to hire three “of their people” [three of the alleged discriminatees], and that there had been no response. At some point Samples received an oral rejection by attorney Maiman. (6:1080–1081).

On cross examination Samples identified a September 11, 1996 letter (GCX 20, not offered), addressed from Samples to the Regional Director at NLRB Region 12, in the final paragraph of which Samples expresses his willingness to hire three of those named in the charges in order to settle the case. Samples has never received a written response, although he received an oral rejection from attorney Maiman sometime lat-

ter—possibly before December 1996, but Samples is “not absolutely sure that it did.” (6:1091–1093). On redirect examination Samples asserts that, in rejecting Samples’ written settlement offer, attorney Maiman said he had presented it to the Union and they had rejected the offer. A month or so later Maiman called again to say that he had again asked the Union, and this time the Union said they would “furnish two men” if Mid-State paid \$1000. When Samples asked what the thousand dollars was for, Maiman said he did not know. Samples said he needed to know. Attorney Maiman has never answered that pending question. (6:1094–1095).

On rebuttal, Sykes asserts that Samples never mentioned settlement of the charges, and reports that he was the Union representative who had the main contact with the NLRB concerning these charges. (6:1192). [Perhaps so, but I note that nearly all the formal papers filed by the Union are signed by Higginbotham. Not until 1997 does Sykes sign any of the formal papers in this case.] On cross examination, Sykes asserts that the first time he ever saw the letter (GCX 20) from Samples to NLRB Region 12, respecting settlement, was that day at trial, and he recalls no conversation with the NLRB regarding the letter. In any event, attorney Maiman never communicated such an offer to him. Respecting any later offer by the Union that a certain number of employees be hired plus the payment of \$1000, “To my knowledge, that never took place.” As to Sykes personally, “I did not make that statement.” (6:1196–1197). Sykes, on redirect examination, adds that Business Manager Higginbotham sometimes takes calls from the NLRB. (6:1198). When Higginbotham testified and was asked, on cross examination (not covered on direct examination) if he remembered Sykes and Snowden going to Mid-State and talking with Samples about settling the charges, he answered that he does not recall any such event. (4:789). Higginbotham was not called as a rebuttal witness by the Government to address the question of whether he had communicated with anyone at NLRB Region 12 concerning possible settlement of the charges.

Following the meeting of December 6, Mid-State hired 18 employees through April 14, 1997. (JX 1 at 3–4). The classifications are not shown on JX 1 for all persons. Roughly, the 18 include some 9 helpers, 1 laborer, about 7 journeymen, and 1 master. The next four persons hired were helpers (counting Jonathan Clemens and William Lowrey as helpers; classifications and pay rates not shown), with the first one (John Mantlo Jr.) hired on December 16. The first journeyman hired after December 6 was Donald Clipp, hired December 31. Recall that one of the 18 hired was Darryl Thompson, on January 20, 1997, and that when Samples Jr. hired him, Thompson was wearing one of the Union’s logo hats. (6:1107).

Samples Jr. testified that, as of December 6, 1996, he could not have predicted with any assurance, that Mid-State would have needed a journeyman on December 31. Journeyman Clipp was hired then because the auditorium and lecture halls area, which had been scheduled to start in August 1996, finally opened for the electrical work. (6:1151).

b. Discussion

Observing that Snowden’s report of the initial portion of the December 6 conversation is quite close to Samples’ version, and crediting Samples in that respect, I find that Samples did not say, as claimed by Sykes, that he was not hiring because anyone had filed charges against Mid-State. Instead, I find,

⁸ The Union’s second amended charge in this case was filed and served on 11–27–96. No copy of any letter seeking clarification of the amended charge was offered in evidence.

Samples said (when Sykes said they were looking for jobs) that Mid-State was not hiring because charges were pending. I need not determine whether such a statement would violate Section 8(a)(1) of the Act, if alleged, for no 8(a)(1) allegation was made or litigated. The conversation bears on the pleaded count of discrimination under Section 8(a)(4) of the Act.

Respecting the allegations of discrimination because of union activities, I find no merit. First, Mid-State in fact was not hiring at the time, and did not need a journeyman until December 31. Second, recall that Mid-State does not hire journeymen, such as Sykes and Snowden, for helper positions. Aside from a couple of borderline instances of overlapping pay rates, there is no evidence that Mid-State has ever hired a journeyman with the experience of Snowden (41 years, 4:638) or Sykes (24 years, 4:805) for a helper position. [Actually, neither Sykes nor Snowden ever indicated that his request for work specifically included a helper's job.] Finally, Snowden was ineligible and would not have been hired in any event. I therefore shall dismiss complaint paragraphs 10(b) and 10(c) respecting the allegations as to the date of December 6, 1996.

Turning to the 8(a)(4) allegation respecting the same paragraphs, I likewise find no merit. This is so even though, after crediting Samples' reference to an attempt to settle the matter with the NLRB but had received no response [no "written" response; he had, I find, received attorney Maiman's oral rejection], I also credit Sykes' version (confirmed by Snowden) that he offered to arrange a meeting with Higginbotham to resolve the charges. No, Samples said, he was not interested in talking with anyone. Just let the NLRB procedure run its course. After Samples' reference to the amended charges, Sykes and Snowden left.

Nothing in this second statement by Samples indicates that he would not consider, or not hire, either Sykes or Snowden because either had filed a charge, or been associated with any of the charges. What about Samples' first statement, not hiring because charges were pending? It ties to the reference about settlement efforts, and therefore seems focused on settlement, but then takes a somewhat different turn by ruling out talks with Higginbotham, or anyone else, and concludes with a reference to letting the NLRB matter "run its course."

Overall, Samples statement is rather ambiguous. It seems clear, however, that neither Sykes nor Snowden was not considered for, or not hired for, a job as an electrician (journeyman) because of the charges. The same hiring factors now come into play as are discussed in relation to the 8(a)(3) allegation — not then hiring anyone and no journeyman needed until December 31, no journeyman is hired for a helper position, and Snowden is ineligible for hire by Mid-State. Accordingly, I shall dismiss complaint paragraphs 10(b) and 10(c), as to December 6, 1996, respecting the alleged violation of Section 8(a)(4) of the Act.

3. January 8, 1997—George Snowden

The discussion of the preceding topic indicates my finding here. George Snowden was ineligible for hire at Mid-State. As this status is unrelated to Snowden's union activities, I shall dismiss the 8(a)(3) aspect of complaint paragraph 10(c) as to George Snowden. As nothing indicates that Mid-State declined to consider Snowden, or to hire him, because he is named in the charges filed, I likewise shall dismiss complaint paragraph 10(c) as to the 8(a)(4) allegation respecting Snowden. Having dismissed the component parts of complaint

paragraph 10(c), I now shall dismiss complaint paragraph 10(c) in its entirety.

4. January 21, 1997—Kenneth Sykes

Earlier I summarized the facts respecting this date. There being no merit to either the 8(a)(3) or 8(a)(4) allegations, I dismiss both respecting the date of January 21, 1997 in complaint paragraph 10(b). As I have dismissed all components of complaint paragraph 10(b), I now dismiss that paragraph in its entirety.

G. Striker Misconduct—Refusal to Reinstate Bruce Audette

1. Introduction

Complaint paragraph 13(a) alleges that a strike began about August 12, 1996 at Physics. Paragraph 13(b) alleges that the strike was caused by the unfair labor practices described in complaint paragraphs 6 [oral promulgation of a no solicitation rule for break time] and 7(a) [threat about August 12 by Superintendent McLeod that Mid-State would close its business if employees were represented by the Union], to which allegations I have found merit. Complaint paragraph 13(c) alleges that, about February 24, 1997, Bruce Audette [one of two strikers], made an unconditional offer to return to his former job. Since February 24, paragraph 13(d) alleges, and Mid-State admits, Mid-State has failed and refused to reinstate Audette. Finally, paragraph 13(e) alleges that the failure to reinstate is based on Audette's union activities. [Apparently by oversight, paragraphs 13(d) and (e) are not picked up by conclusory paragraph 15 (that such conduct violates Section 8(a)(3) of the Act). As the matter was litigated without objection to a violation incompletely alleged, I find that it was tried by implied consent under FRCP 15(b).]

The primary issue litigated, and argued, is whether Audette engaged in strike misconduct so serious as to forfeit his right, as an unfair labor practice striker, to reinstatement. I shall pass over the nature of the strike quickly, noting that on August 12, 1996 Anthony Baccili and Audette told Superintendent McLeod that they were going on an unfair labor practice strike to protest the announced restrictions on soliciting during breaks in the construction, or job, trailer. (3:529, 550–551; 4:698–699). Superintendent McLeod confirms their testimony. (5:971–972, 1013–1015). [Note that the sole stated ground, that has been found to be an unfair labor practice, was the no solicitation rule, and does not include McLeod's company-closing threat, which came after the announcement of a strike. Additionally, there is no evidence that Baccili and, or, Audette later counted that threat by McLeod as reinforcing their decision to strike or that it served as an additional reason either of them decided to remain on strike.]

By his letter (GCX 14) of September 5, 1996, Audette informed Mid-State that he was still engaged in the unfair labor practice strike against Mid-State. (4:705–707). Eventually, by his memo (GCX 15) of February 24, 1997 faxed to Mid-State, Audette "unconditionally offer[ed] to return to work immediately." (4:707–708).

On that February 24, Audette testified, he went to Mid-State where he met Samples Jr. in the parking lot. According to Audette, he asked if Samples Jr. had received the fax. Samples Jr. said yes. Audette said he was offering to return to work from his strike. Samples Jr. replied that he had no work for Audette because "I've already replaced you." Audette claims Samples Jr. said that if he had to let someone go to

make room for Audette it would be unfair and that person might want to meet Audette in the parking lot. Audette told him not to worry, that such was Audette's problem, but that he was offering to return to work. Samples Jr. said he would have to speak with his lawyer and would get back to Audette. But Samples Jr. never did, Audette asserts, even though Audette later left a message at the office that he might have to file a charge if he was not returned to work. He never was. (4:709–711).

Not disputing Audette's account of the February 24, 1997 parking-lot conversation, Samples Jr. asserts that he had decided that Audette could not return to the payroll because he "promoted violence against other employees." (6:1162). Samples is more specific, saying that he "enforced" his son's decision, and will not have Audette back on his payroll, because of a potentially fatal threat to Maurice Reuss and because of his earlier threat against Ralph Banks. (1:89–90).

Although Audette's account is undisputed, I find one statement to be his own embellishment—the part about Samples Jr.'s saying anyone replaced might want to meet Audette in the parking lot, and Audette's claimed response. I do not accept this embellishment for four reasons. First, it is contrary to Audette's own testimony that Samples Jr. had told him, in connection with the Ralph Banks incident, that he did not want any altercations on the jobsites. Second, it is directly contrary to Samples Jr.'s credited testimony respecting his position about the threat against Reuss. Third, the embellishment has an internally unnatural fit with the rest of the conversation, suggesting that it is a later-inserted addition. And fourth, Audette's delivery of this portion had a hollow ring, Audette's demeanor was poor respecting it, and I do not believe him.

2. Samples Jr.'s basis for denying reinstatement

a. Background—the Ralph Banks incident

As background to his decision, Samples Jr. relies on an incident in about April 1996 where Audette, apparently at the end of the workday, went onto a different job of Mid-State's for the purpose of confronting another Mid-State employee, Ralph Banks. Audette admits (4:722) that he told the job superintendent, Mike Watson, that if he found Banks he was going to fight him. Watson told him that such was not needed there, and Audette left. Audette places the event as about late March 1996. (4:724).

Samples Jr. asserts that Watson called him that evening to express concern over the problem. The next morning Samples Jr. went to Audette at the jobsite and informed him that he would not tolerate fighting on the job, and he warned Audette not to go onto other jobsites looking to fight people. (6:1161–1162). Conceding that Samples Jr. did come and talk to him, Audette asserts that Samples Jr. made light of the incident and, although saying that there should be no altercation on the jobsite, Samples Jr. also said that he did not care what happened away from the jobsite. (4:723–724). Samples Jr. does not dispute Audette's account.

It appears that both Samples Jr. and Audette, each describing the incident from his own perspective, are correct. In that sense, Samples Jr. made a point to Audette—no altercations on the jobs. Although Audette's personnel file contains no written evidence of the incident, much less that a warning was issued, that obviously means little, for both witnesses acknowledge that the incident occurred. Audette's personnel file contains evidence that Audette received a raise effective April

10, 1996. (6:1167–1168). As the date of the incident ranges from late March to sometime in April, it is unclear whether the raise came before or after the incident. In any event, Audette continued working.

b. Strike misconduct—Maurice "Moe" Reuss incident

A week after beginning his strike at Mid-State, Audette began working for a union contractor, Cleveland Electric, at the same general jobsite, but on the engineering building. That building and Physics used the same parking lot. (4:701–702, 739; 5:1027–1029). All agree that an incident occurred in the parking lot before work early one morning. Reuss dates the occasion as some 2 to 3 weeks into Audette's strike. (5:1029). For convenience, I shall date the incident as occurring on August 30, 1996.

Three witnesses describe the incident—Audette, "Moe" Reuss, and Barry Brunges. Reuss still works as an electrician for Mid-State (5:1018), as does Brunges (5:1067). The accounts of Reuss and Brunges, while different in some basic details, are generally consistent respecting the core issue. Audette's versions is substantially different. The demeanor of Reuss and Brunges was favorable, and that of Audette was unfavorable.

On this occasion, as Reuss, Brunges, and Glen Baldwin, another Mid-State electrician (but now an inspector for the county, 5:1069), were talking in the parking lot, Audette approached the group, bragging about the money he then was earning under a union contract. The others started to leave, and Audette, pointing his finger at Reuss, told Reuss, "Old man, I ought to beat the shit out of you." Reuss replied, "Young man, you've got a lot to learn." "Old man," Audette responded, "you got a lot to learn, and I'm not 30 years old yet." "I know you're not 30" Reuss responded as he and the others left. (5:1030, Reuss). Reuss reported the threatening conduct to McLeod and Samples Jr., and Samples Jr. obtained a permit for Reuss to park in a different lot, closer to Physics, so he could avoid Audette. (5:1030–1031; 6:1160–1161, Reuss). Reuss credibly reports that he had always tried to avoid Audette at work because Audette seemed to take pride in describing his fights in which he would whip someone. (5:1024).

Brunges reports that Audette came over to the group verbally attacking Reuss, saying, "You fucking old man; I ought to slap the shit out of you." This was followed with a statement by Audette that he ought to slap Reuss for being so damn stupid by not joining the Union. (5:1068–1070).

It is undisputed that, in the days before Audette went on strike, and the after the employees had begun discussing the union while on breaks, Audette, at least on one occasion, had defended his position favoring the Union by pointing to Reuss as the "ghost of your Christmas future." Audette followed this colorful phrase with the explanation that Reuss had no union benefits and had to work at retirement age, whereas Audette planned to be on retirement with union benefits at that age. (4:725–726; 5:1024–1025). Actually, Reuss is a retiree with a 35-year government pension, and works because he wants to do so. (5:1025, 1033).

According to Audette, he was talking with the others about joining the Union when Reuss came and "butted" into the conversation by making negative comments about unions. As the other two had said they did not want to join, Audette remarked to them, not to Reuss, that sometimes he would like to

“slap some sense” into Baldwin and Brunges. Reuss thought Audette was speaking to him and challenged Audette to go ahead and slap him. Reuss acted mad, not scared. Audette said he was not speaking to Reuss. (4:704–705, 726–728).

At the time of this parking lot incident, Reuss was 65 and 5 feet 9 inches tall, and he currently weighs 185 to 190 pounds. (5:1032, Reuss). Audette recalls Reuss as being about 60, 5 feet 6 inches or 5 feet 7 inches tall, and about 170 pounds. (4:724–725). By contrast, Audette was 29 in August 1996, is 5 feet 9 inches, and weighs 200 pounds. (4:713). Audette appears to be in robust health, with no flab showing on his husky appearance.

Also at that time, and generally known among supervisors and employees, Reuss had a surgically implanted artificial heart valve and a pacemaker. The doctor had advised Reuss, who also had high blood pressure, to avoid any activity which could result in a blow to his chest because it could tear the artificial valve loose. (5:1020–1023).

Having observed the witnesses, I do not believe Bruce Audette. Rather than Reuss’ being the aggressor, I find that he was the victim of Audette’s threat of physical violence. Reuss did nothing to provoke Audette’s verbal attack. The context of this attack shows that Audette’s remarks, far from being hyperbole, or some trivial figure of speech, constituted a physical threat with an unspecified date of execution—perhaps then, or perhaps the next time Audette met Reuss in the parking lot. With Reuss’ artificial heart valve, any physical violence against him could be fatal. I credit Reuss’ account, as supported in significant respects by the report of Brunges. I reject the version given by Bruce Audette.

3. Discussion

The General Counsel contends (Brief at 37) that the strike misconduct ground is a “pretext” because it was not mentioned by Samples Jr. to Audette on February 24, 1997, and the only ground given then was “replaced.” To the extent this includes an argument that Mid-State condoned Audette’s conduct, I find it without merit. Condonation is not to be lightly inferred, and the facts must show that the employer has agreed to “wipe the slate clean.” *White Oak Coal Co.*, 295 NLRB 567, 570 (1989). On that February 24 Samples Jr. also told Audette that he had to talk with his lawyer and would get back with Audette later. Nothing is unusual about a client’s consulting his lawyer before making a decision. That discussion yielded Mid-State’s position—no reinstatement because of strike misconduct. Thus, there was no condonation.

Turn now to the question of whether the violence threatened by Bruce Audette is so serious that he forfeited his right as an unfair labor practice striker to reinstatement. The General Counsel says no; Mid-State argues yes. I agree with Mid-State. It is well established that any strike activity by strikers must be peaceful activity. *Clear Pine Mouldings*, 268 NLRB 1044, 1047 (1984). There quoting with approval from a court decision, the Board wrote that an employer “need not countenance conduct that amounts to intimidation and threats of bodily harm.” *Id.* at 1046. Thus, the Board adopted this standard, 268 NLRB at 1046:

Whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

The test is objective, not subjective. *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990).

In our case Audette’s August 30, 1996 threat against Maurice “Moe” Reuss of physical violence, even though not then accompanied by any overt action, clearly meets the forfeiture standard established in *Clear Pine*. As the Board there stated, “a serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker.” *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984).

Citing outdated authority, the General Counsel (Brief at 36) contends that the Board “balances the alleged misconduct against the severity of the unfair labor practices which provoked the strike in determining if a striker is entitled to reinstatement.” Not so. *Mohawk Liqueur Co.*, 300 NLRB 1075, 1075 fn. 3 (1990). Nevertheless, as the Board did in *Mohawk*, I apply that balancing and conclude, as did the Board there, that the limited unfair labor practice found to be the cause of the strike (a no solicitation rule under which no employee was disciplined) was “not of an egregious nature that could be deemed to have provoked, or could justify,” Audette’s threat of physical violence.

On these considerations I find that Mid-State did not unlawfully fail to reinstate unfair labor practice striker Bruce Audette in response to his February 24, 1997 unconditional offer to return to work. Accordingly, I shall dismiss complaint paragraph 13(d).

Complaint paragraph 13(e)—refusal to reinstate because of union activities—appears to be a last-ditch effort, or fallback position if all else fails to save Audette. The General Counsel’s “pretext” argument (on February 24 Samples Jr. mentioned only “replaced,” and not strike misconduct) is the Government’s only supporting contention for this allegation.

The same reasoning applies here as earlier—Samples Jr. also told Audette he would have to consult his lawyer. The result of that consultation was the answer (provided at trial) of strike misconduct. Moreover, if by “pretext” the General Counsel means disparity of treatment, then the Government allegation fails, for no record evidence exists showing that Mid-State has condoned similar conduct by nonstrikers or employees who appear to be nonunion. And nothing indicates that Mid-State declined to reinstate Audette because he supported the Union or went on strike. There being no evidence to support the allegation, I shall dismiss complaint paragraph 13(e).

Finally, in dismissing complaint paragraphs 13(d) and 13(e) I have not overlooked that Audette pleaded “no contest” in about 1988 to a charge of disorderly conduct, involving a fight (4:719), and about 1992 (4:720) to a charge of “reckless display of a firearm.” However, while I have peripherally considered such items in resolving credibility, I note the absence of evidence that either Samples or Samples Jr., before the trial, had learned of these criminal matters and that such prior (no contest) convictions formed some of the basis for their deciding to deny Bruce Audette reinstatement.

H. The Discharges

1. Introduction

The complaint names two employees as having been discharged in violation of 29 USC 158(a)(3). About February 4, 1997, complaint paragraph 11(a) alleges, Mid-State discharged Jose Ayala. About March 31, 1997, paragraph 11(b) alleges,

Mid-State discharged Charles Albert. Mid-State admits the fact of the discharges, but denies that it violated the statute in discharging either employee.

2. Jose Ayala

a. Facts

A member of the IBEW for several years (first with a local in New York, then with Local 1205 in Gainesville; 2:267–269), and wanting to work in Gainesville, Ayala asked the Union for permission to apply for work with Mid-State. As such fit the Union's needs, the Union agreed. (2:267, 297). Interviewed and hired (at \$9.50 per hour) by Samples Jr. on the day of his application (JX 3 at 14), December 2, 1996, Ayala did not divulge information about his union membership. (2:267, 285; JX 1 at 3). The prior employers listed by Ayala on his application are all nonunion contractors. (2:268, 297–298).

Tuesday, February 4, 1997, was Ayala's last day at Mid-State. At the end of the day he was escorted to the job trailer where Job Superintendent McLeod fired Ayala. (2:278–279, Ayala; 5:951, McLeod; RX 18 at 3). Ayala testified that McLeod gave him three reasons for his discharge. One, poor productivity. Two, complaints by two employees that Ayala had been talking union to them and they did not want to work with Ayala anymore. And three, excessive absenteeism. (2:279).

For his part, McLeod denies that his termination recommendation (to Samples Jr.) included absenteeism. (5:963). Initially, Samples testified that it did, confirming much (but not the focus on union) of the three grounds (although greatly expanding the talking and roaming aspect) listed by Ayala (1:51–52), but later retracts to say that he got the absenteeism aspect from his examination of the payroll records (6:1086–1087). McLeod testified that his recommendation to Samples Jr. for discharge of Ayala was based on, in effect, production problems (poor quality, slow productivity, and inadequate knowledge or skills of the electrical basics) and standing around and talking instead of working. (5:947–950). Samples Jr. confirms the recommendation and that he approved the discharge recommendation when it was clear that, after all the steps McLeod had taken to see what Ayala could do, even assigning him a helper, “the work still wasn't getting done,” so “at that time we chose to terminate him.” (6:1156–1157).

Ayala worked at Physics. (2:271). Not much is in the record concerning Ayala's first 7 to 8 weeks on the job. We learn that he missed work several times in that period, but this was due to a disabling heart condition of his son. On some of these occasions Ayala was able to alert McLeod in advance and obtain his permission to be absent, while at other times it was simply notice that an emergency with the boy had arisen. McLeod told Ayala that he understood, for he had children of his own. The boy's medical condition eventually led to heart surgery in January to correct the problem. At no point did McLeod ever suggest that Ayala would have to do something to avoid missing work, either at the time or later. (2:279–282, 285–289).

By letter (GCX 4) dated January 29, 1997, from Harold Higginbotham of the Union to Samples, the Union notified Mid-State of (renewed) organizing, and listed three names as a “partial list of union organizers.” The names Higginbotham listed are Michael Cooper, Jose Ayala, and Steven James. That same Wednesday, January 29, as McLeod's notes reflect

(RX 18 at 1), Ayala and Cooper personally notified McLeod of their organizing, showing him a copy of, apparently, Higginbotham's letter of that date. (5:958, McLeod). Later that day, also as his notes reflect (RX 18 at 1), McLeod warned the second floor crew (five persons, Ayala being one) that he would not tolerate the poor quality of their work, and their slow production, and that he would terminate the whole crew if they did not improve. (2:290; 5:958). Of the five on the crew, only two (Ayala and Steven James) were announced union supporters. (5:958–959).

Before he announced his union organizing status, Ayala, as just noted, had been working on the second floor, where he had been assisted by a helper. (2:275–276). Apparently 2 days later, Friday, January 31, 1997, Ayala was moved to the “basement”—the ground floor. “Well, it looked like a cellar down there.” (2:276, Ayala). Ayala does not specify the day or date (he admits he is not good with dates, 2:300), but states that it was 2 days before Aaron Harvey was assigned to be his helper on Monday, February 3. (2:276). McLeod describes work by Ayala on 60 feet of conduit the (apparently) first day he was in the basement. McLeod's notes (RX 18 at 1) and testimony (5:959) place this as being January 31. McLeod testified that later that day Ayala and Daryl Thompson informed him that Ayala had a problem from epileptic seizures and could not work alone, so McLeod assigned Harvey to help him. (5:948–949). Harvey arrived the next day, which was Monday, February 3, as previously discussed in relation to the allegation, and my finding, that McLeod created the impression of surveillance that February 3. (2:276, 299–302).

Although Ayala testified that he had no helper his first day in the basement, whereas he had worked with a helper on the second floor, the record does not describe what work Ayala was doing on the second floor. In the basement, at least part of the time, Ayala was working on a 12-foot ladder. (2:277, 300). Clearly it was convenient to have had a helper to hand items up rather than Ayala's having to climb down the ladder to get something. It also makes economic sense, a reason Mid-State wants to have at least one helper for each journeyman.⁹ (6:1137, Samples Jr.). Indeed, Samples Jr. expressly cites the ladder situation as a specific example of the need for and use of a helper. (6:1137–1138).

The complaint does not allege that Ayala's transfer to the basement was a separate violation of the Act, nor does the General Counsel argue on brief that the transfer was a direct response to Ayala's January 29 announcement of his organizing status. For his part, McLeod explains that he transferred Ayala to the basement because he caught him “standing around” and two helpers, Steven James and Daniel Kelly, complained that they did not like working around Ayala because he was interfering with their work. (5:947–948, 950). This came after (apparently the next day after) James and Ayala had announced their union status on January 29 and afterwards, on that same January 29, McLeod had given the five-man second floor crew a tongue lashing for poor quality and slow productivity. [Recall that McLeod warned the crew (as reflected in his notes, RX 18 at 1, and testimony, 5:958–

⁹ Although the transcript records Samples as saying “8 to 2 people” (1:96), I think that is a garbled version of what he actually said. Whatever he said caused me to write “50/50” in my notes. Volume 1 of the transcript is poorly transcribed. (The court reporting service apparently has since gone out of business.)

959) that he would not tolerate such and would get rid of them if it continued. Also, of the five men on the crew, only two (Ayala and James) had announced for the Union. (5:959.) Ayala discloses that such was not the first time that McLeod had called the entire second floor crew together. Unfortunately, Ayala does not tell us the nature of those other meetings. (2:289–290).

At the time, Mid-State did not use written warnings, but relied on daily logs the supervisors maintained and on person to person contact. (6:1104–1105, Samples Jr.). Ayala's personnel file has notations of four reprimands having issued to Ayala, starting with the date of January 29, 1997. (5:1011–1012; 6:1170). In short, nothing had warranted even a file notation until January 29, and then four reprimands are noted in the space of a few days. Neither party saw fit to describe the nature of the four reprimands. From the record, I can infer that the four are as follows.

First, the group tongue lashing of January 29. That is recorded in McLeod's notes for that date (RX 18 at 1), described by McLeod (5:947, 958), and admitted, at least in part, by Ayala (2:290). Second, a notation of not working but talking and interfering with the work of others, based on the asserted report of James and Kelly, neither of whom testified at trial. [January 30 appears to be the date of the report, that being the day before Ayala was transferred.] McLeod does not contend that he confronted Ayala with this allegation (even if the names were kept confidential). Nor does McLeod contend that he confronted Ayala when he saw him "standing around" on, apparently, Thursday, January 30, the day after the tongue lashing of the group.

Third, and the one generating the most evidence, Ayala's work on Friday, January 31. McLeod severely faults Ayala's work performance both as to quality and quantity for that date. It centers on Ayala's installing 60 feet of conduit. McLeod asserts that it was a 1-hour job, but that it took Ayala all day. (5:948). On direct examination, Ayala denies ever being told, before his termination, that there was a "problem" with his productivity. (2:282). On cross examination Ayala admits quite the opposite, as I describe below. Fourth, an OSHA violation (leaving a ladder leaning against the wall) on February 3. McLeod's notes (RX 18 at 2) record this and assert that McLeod told Ayala about it. McLeod confirms both the act and that he told Ayala that it was an OSHA violation. (5:960). Agreeing that such is an OSHA violation, Ayala denies all the rest. (2:289).

Respecting the group warning of January 29, nothing shows that the warning was improperly motivated. Indeed, Ayala reports (2:290) that McLeod had called the crew together "various times," although we are not told for what purpose.

As for the asserted reports from Steven James and Daniel Kelly on, as I have found, January 30, and McLeod's claim that he caught Ayala "standing around," Ayala was not called as a rebuttal witness to address these claims by McLeod. Even though McLeod, at some point, apparently decided to describe, for Ayala's personnel file, the matter as a reprimand to Ayala (5:1012), McLeod does not list the matter in his contemporaneous notes of January 1997 (RX 18). However, neither does he list Ayala's transfer to the basement, and there is no dispute that such an event occurred. It is clear that McLeod's notes do not contain an account of everything. The notes do contain entries stating that, on January 31, Daniel Kelly told McLeod he was glad that McLeod had relocated Ayala because Ayala

had been talking instead of working [on the second floor] causing "him [Kelly, apparently] not to complete [his] work." (RX 18 at 1–2). On that same date Steven James, the notes record, told McLeod he also was glad of Ayala's relocation because he was tired of repairing Ayala's work and observing that Ayala would not listen to him when James told him what was wrong. (RX 18 at 2). McLeod confirms by testimony. (5:959–960).

Turn now to the second warning for quality and production, or the third reprimand. The item most prominently mentioned here in the testimony is the installation of 60 feet of cable. Earlier I described McLeod's assertion that Ayala took all day to do a 1-hour job. (5:948, 959). Ayala's description of the work would suggest something taking much longer than 1 hour (2:292): "I was running wire conduits. I was also putting a rack up and I had to go around other people's work. And I had to break through concrete blocks to get it out to the hallways onto a cable tray."

Also as mentioned earlier, on direct examination Ayala denies ever being told, before his termination, that there was a problem with his productivity. (2:282). Barely 10 pages later, on cross examination, Ayala admits to that very fact respecting the installation of the 60 feet of conduit in the basement on January 31. (2:290–294). On that occasion, Ayala concedes, McLeod, about 2:45 that afternoon, came and told Ayala that he was "not going to tolerate people just getting away with running a certain amount of pipe." "Q. And he told you that you couldn't expect to get away with that? A. Something like that. Yeah. Q. And that you were being paid a wage of \$9.50¹⁰ an hour? A. Right." And on that occasion McLeod told Ayala that he thought Ayala would have been finished with the pipe and that McLeod needed to start running wire there. Clearly, I find, McLeod expressed the idea to Ayala that McLeod had a "problem," a real problem, with Ayala's productivity.

Although agreeing that McLeod came and expressed the foregoing to him on January 31, Ayala asserts that McLeod would not listen when Ayala tried to explain that he had stopped for a total of about 2 hours to help Charles Albert handle some 100 feet of very heavy equipment (cable, apparently). (2:290–294). This was not further explored, and the record does not disclose how customary or reasonable it would have been for Ayala to have stopped his own assigned work and, without consulting McLeod, devote a substantial portion of his time helping Charles Albert. Moreover, when testifying himself, Albert offers no testimony supporting Ayala on this matter. Indeed, when describing his assignment to the basement, and having to work on a 12-foot ladder without a helper, Ayala discloses (2:300), "There was nobody around the whole place." Ayala's description rang hollow in the telling, and the record does not support his version.

The 60-foot cable matter relates to quantity of production. Respecting (poor) quality, McLeod offered un rebutted testimony that, either later that same date, or possibly on Monday, February 3, McLeod "tried to put him [Ayala] on pulling wire to see if he could do that, at which time I determined very shortly afterwards he could not pull wire because he did not know how to do that." (5:948, McLeod). McLeod explains

¹⁰ Although JX 1 at 3 shows Ayala classified as a helper, both Ayala (2:290–291) and McLeod (5:949) appear to have understood that Ayala was being paid as a journeyman.

that Ayala had put too many neutral wires in one conduit and not enough neutrals in the other conduit. (5:949). “At about that time I called Billy [Samples Jr.] and we talked about it, and he [Samples Jr.] came out and we terminated him” [Ayala]. (5:948).

Before turning to the fourth event, I should note McLeod’s testimony that he has fired two others for poor quality and productivity: Larry Polk Sr. in 1996 (5:952–953) and James Campbell in 1997 (5:953–954). [Although JX 1 at 3 has no termination dates for either Polk or Campbell, suggesting that any termination came after April 14, 1997, the document also shows no termination dates for Ayala or Charles Albert, and there is no dispute that they were terminated before April 14. JX 1 is not entirely reliable respecting termination dates. For further example, it incorrectly shows that Darryl Thompson was both hired and terminated on January 20, 1997. (JX 1 at 4.) Yet we know, as discussed much earlier, that Thompson did not leave until shortly after the April 18 election, for he was the Union’s observer at the election. (2:158, 161).]

Respecting the fourth event—the ladder incident of Monday, February 3, 1997—I credit McLeod. His note for the incident appears right above the acknowledged incident when Samples addressed the organizing committee that February 3. (RX 18 at 2). Moreover, one page later McLeod made a similar notation about telling Scott Hedrick not to lean a ladder against the wall. As mentioned earlier, Hedrick had not indicated any support for the Union. McLeod confirms as to both. (5:960).

McLeod testified that Samples Jr. accepted his recommendation to terminate Ayala. (5:947–950). Samples Jr. confirms that he approved McLeod’s recommendation based on problems with Ayala’s “quality and quantity of work” and the fact that Ayala “wanted to stand and talk” and “walk out of his work area” and “there was a lot of work that wasn’t done up to code.” Rather than singling out Ayala, McLeod told Samples Jr., McLeod had assembled the whole second floor crew, told them to correct the problems, and then moved Ayala to the basement “to see what he could do on his own.” After McLeod was informed that Ayala had a medical problem, McLeod assigned him a helper, yet “the work still wasn’t getting done. So at that time we chose to terminate him.” (6:1156–1157).

On Tuesday, February 4, 1997, as McLeod’s notes reflect (RX 18 at 3), and as Ayala (2:278–279) and McLeod (5:948, 951) confirm, McLeod terminated Ayala. Ayala testified that McLeod gave three reasons for the termination. First, poor productivity. Second, two employees complained that Ayala was talking union to them and they did not want to work with Ayala anymore. And three, excessive absenteeism.

Although McLeod asserts that he did not include absenteeism as a basis for his recommendation that Ayala be discharged (5:963), Samples (1:51–52) initially recalled it as one of the grounds. When testifying later, Samples retreated and claimed that McLeod had not told him of the poor attendance, but that the pay roll records so disclosed. (6:1086–1087). Samples Jr. does not list absenteeism.

McLeod acknowledges that one ground for his recommendation of termination was that he caught Ayala standing around (apparently after McLeod had spoken to the second floor crew on January 29), and two employees, Dan Kelly and Steven James, told McLeod that they did not like working around Ayala because he interfered with their being able to

work. Presumably that is when McLeod reassigned Ayala to the basement. Steven James, McLeod testified, had already “come out” for the Union when he and Daniel Kelly complained that Ayala “was talking too much and not working.” James and Kelly were classified as helpers, as was Ayala, bargaining unit there were paid less—\$8.50 and \$8, respectively, to Ayala’s \$9.50. (JX 1 at 1, 2, 3).

As McLeod does not dispute Ayala’s first ground, that of poor productivity, I find that it was given. Although Ayala possibly could have added the absenteeism ground as part of a scheme to make Mid-State look bad, I find that McLeod did list it. Indeed, Samples let the cat out of the bag, so to speak. Later, Mid-State determined that the absenteeism ground would appear to be overkill, and so it was scratched. However, someone forgot to tell Samples until after he had testified on the first day as the Government’s witness. By adding absenteeism, which missed time had been approved in advance or excused by McLeod or at least nothing said before the Union status announcement, Mid-State discloses that it had an extraordinary reason, beyond normal production reasons, for wanting to seal tight the discharge of Jose Ayala.

Respecting the second ground, I credit both accounts. That is, I find that there was a reference to talking union, but that it was in the context of Ayala’s not doing his work and interfering with the work of Steven James and Daniel Kelly. In this connection, I attach weight to the fact that McLeod knew that James was one of those who announced that he was organizing for the Union. James, however, apparently did not let his organizing interfere with his work or the work of others. McLeod, it appears, respected James for this. Recall the testimony of the impressive witness, Anthony Baccili Jr., that after Baccili made known his organizing status McLeod still praised his work and treated Baccili “straight up.” (3:538–539).

b. Discussion

When the timing is considered with the findings of unfair labor practices already made, it is possible that the Government can be found to have adduced a prima facie case of unlawful motivation in the discharge of Jose Ayala. Assuming that to be so (and such a prima facie case would not be a strong one), I further find that Mid-State carried its affirmative-defense burden of showing that it would have discharged Ayala even absent any union considerations. The main basis of the discharge was Ayala’s poor quality and limited production. Ayala was not the first to be discharged for such, nor was he the last. Not only is the main ground credibly established, but the second ground (of talking rather than working and interfering with the work of others) is also supported. Accordingly, I shall dismiss complaint paragraph 11(a) respecting the February 4, 1997 discharge of Jose Ayala.

3. Charles Albert Jr.

a. Facts

(1) Other than the junction box incident

As discussed earlier under the topic of alleged interrogation by Supervisor Dampier on March 26, 1997, I again note that Charles Albert Jr. had been a member of the Union since about August 1994. (2:217). He started work at Mid-State about November 12, 1996. (2:217; JX 1 at 3). Although he holds no electrical license, Albert has worked as an electrician since about the summer of 1985. (2:217). According to Albert, he

notified the Union and took on the organizing duties of a “salt” after he was hired at Mid-State. (2:252). In its February 5, 1997 letter (GCX 3) to Mid-State, the Union named Albert as one of the six employees helping (a “partial list”) to organize the company. Some 2 to 3 weeks (2:221) after his 50 cent pay raise to \$9 an hour on (2:233; 5:1011) January 15, 1997, Albert “started talking a little more about the Union” and began openly wearing a Union shirt. After that, he was left to work alone. Foreman Bernie Owens would check on him two or three times a day two or three times a week. (2:221–222).

[Except as possibly referred to by McLeod in the next paragraph, the nature, location, and duration of this solitary work assignment for Albert is not further described, and there is no explanation whether such was routine or unusual either for Albert or for other employees. Also, the significance is open to question. This is so because, as Albert describes, when he went to Samples Jr. in late December and asked for a pay raise, a key factor in the argument he presented was that he was working alone (2:255)—suggesting that he was a reliable electrician and deserved a pay increase, which he subsequently received. I draw no inference that there was anything improper in this February work-alone assignment.]

Albert worked at Physics where (William) Patton McLeod was the job superintendent. McLeod testified that Albert did good work (both as to speed and quality) in his first assignment on the ground floor (basement). Shortly before McLeod assigned Albert to the first floor, to continue that work, Albert informed McLeod that he was a member of IBEW Local 1205. (5:964). The only reference in McLeod’s notes to any notice by Albert is an entry for February 4 reflecting that one Dana Day confronted Albert “about saying he went Union.” (RX 18 at 3). Although the entry possibly means that Albert had been saying that Day had gone Union, the better interpretation, in light of all the evidence, is that McLeod overheard Day confronting Albert concerning Albert’s saying that he, Albert, had gone Union. In short, as of February 4, a day before the Union’s letter of February 5 to Mid-State naming Albert, among others, McLeod noted the conversation between Day and Albert about Albert’s saying he had gone Union. Within a day or two, I find, McLeod received official notification that Albert was organizing for the Union. Whether this resulted from the Union’s February 5 letter, or from Albert’s personally informing McLeod (as McLeod suggests at 5:964), I need not find. About the same time, I find, Albert began wearing his Union shirt.

At the end of the workday, Monday, March 31, 1997, Samples Jr. fired Albert following Samples Jr.’s learning that Albert had botched the installation of a junction box. (1:53; 2:226; 5:970; 6:1159). The junction box incident was the culmination of a series of events, and I turn now to describe those events. [On brief, the General Counsel does not mention or discuss these matters.]

Following Albert’s notice to McLeod of his Union status, McLeod testified, Albert’s work habits and the quantity of his work greatly deteriorated. McLeod assertedly spoke to Albert about this on several occasions, and about being out of his work area talking to others. Once McLeod caught Albert in the basement interrupting Daryl Thompson and two others. McLeod told Albert that he needed to return to work. “His quality of work and his quantity went way down.” (5:964, McLeod).

The first of several notes McLeod made about Albert’s deteriorating quantity and, or, quality was that for February 10 when McLeod made a brief entry of talking with Albert about “pipe work—level and plumb.” (RX 18 at 4). McLeod testified that piping [conduit, apparently] at Physics had to be installed in an exposed position. Accordingly, it had to be installed “neat, straight, and square with the building.” However, Albert’s “pipe work at that time was not running level; it was running downhill. It was not running square with the building.” (5:968, McLeod). Other than generally denying that his salting activities caused him to take a different interest in his work (2:260), Albert was not called as a rebuttal witness and therefore never expressly addresses McLeod’s description of Albert’s piping work on February 10 as “running downhill” and “not running square with the building.”

On March 3, McLeod’s notes assert (RX 18 at 6), McLeod talked with Albert “about workmanship—2nd time we made him correct his work.” McLeod testified that it was a repeat problem with Albert’s piping “not running square with the building.” (5:968). This, therefore, was the “second time” Albert had been directed to correct his piping work. Again, Albert does not specifically deny respecting his piping work. He describes an incident, no date give, when he had to remove piping he had installed, but the problem was caused by management’s designating the wrong height. (2:247). Unfortunately, the record does not tell us whether this is one of the two incidents described by McLeod. In any event, other employees installed pipe or other work that had to be reinstalled properly. (2:248–249, 262). But we do not know whether any of these employees were warned, or whether management made any notes concerning them. Thus, no disparity is shown by the brief references to them.

The following day, March 4, McLeod’s notes reflect (RX 18 at 6), Samples Jr. came over and gave a “final warning” to Albert for [poor] “workmanship.” McLeod confirms that “we would not tolerate this job being done improperly.” (5:968). Samples Jr. agrees that he warned Albert, but his descriptive reference to “strapping his conduit properly.” (6:1158) suggests that Samples Jr. has mentally merged events. The “strapping” is an incident covered in McLeod’s notes for March 28. In any event, Albert agrees that about March 4 Samples Jr. came and gave him a “final” warning [but the first one he had received, Albert asserts] for substandard work, and that Samples Jr. stated that he knew Albert could do better work. (2:222–223, 256).

A third work problem occurred on Thursday, March 20. Per his log, McLeod told Albert that he wanted the “lab feeds done by 3:30 p.m. 3/21/97.” (RX 18 at 7). In his next entry, for (Wednesday) March 26, McLeod records, “Charles Albert still not done with Lab feeds. Only was 80’ conduit—milking job.” (RX 18 at 7). McLeod confirms these entries, explaining that the assignment was given in the morning, when Albert had only two feeds left. By the following Thursday, Albert “still was not done,” had run “only 80 foot of conduit” [the record fails to show the number of feet needed to install the two lab feeds], “and I wrote down that he was milking the job.” By “milking,” McLeod meant that Albert was taking “way longer” to do the work than the time he should have needed. (5:969).

Conceding the fact of the assignment, Albert says no deadline was given. (2:257–258). He correctly denies (2:258) that McLeod accused him on March 26 of “Milking the job” be-

cause McLeod, merely writing that assessment in his notes, never claims he said that to Albert. Unfortunately, neither witness tells us what Albert worked on in the intervening days. Was it all on the two lab feeds, and if so, why would it take that long, or not take that long? Also, if McLeod wanted the work done by the end of the day on Friday, March 21, why did it take him until the following Wednesday, March 26, to check on the work, see that it still was not done, and enter a note in his log? Questions abound. Even so, I am persuaded that the assignment was made as McLeod describes, and that when he finally checked on the work, it still was not done.

On March 27, McLeod recorded in his log, he twice caught Albert talking rather than working, “once was about organizing, once was suspected of same. I told Charles we were here to work—talk would not be tolerated.” (RX 18 at 8). McLeod confirms, asserting, “One of those incidents was when I caught him with Daryl Thompson.” (5:969). Denying this, Albert agrees that, on another occasion when he was sweeping and had stopped to talk, he was told to resume working. (2:258–259). Albert also asserts that, on March 27, McLeod told him that he needed to complete whatever assignment it was he was working on. [Albert does not recall the nature of the assignment.] Albert told McLeod that if he had some help he could complete the work sooner. McLeod simply walked away. (2:225).

The “strapping” incident of March 28 is next. McLeod’s notes for this date reflect that he told Albert to relocate side panel conduits that he had put on the “wrong side of wall.” “Also told him said conduit was not properly strapped—his response was that it was—I ended up having someone else fix conduit.” (RX 18 at 8). McLeod confirms. (5:969). Albert mostly denies, conceding only that McLeod merely said he wanted another strap put in a certain spot. “He just thought it needed another strap. He did not say that he thought that I had done the job incorrectly.” (2:259–260).

McLeod has two entries for March 31, both pertaining to Albert. The first reports that he caught Albert “talking instead of working—when he saw me he took off the other way because he knew he was out of his work area.” At trial McLeod confirms by reading the entry. (5:969). Albert does not address the incident. The second entry reflects that later that day Albert was terminated (RX 18 at 9), and McLeod confirms that such occurred after Samples Jr. came to the site and inspected the junction box. (5:970).

(2) The junction box incident

A photo (RX 1) of the (2:227–228, 239, 263) junction box (GCX 7, not offered) is in evidence. Square in shape (2:241, Albert), the junction box, as the parties stipulated (2:237), has dimensions of 2 feet high, 2 feet wide, and 8 inches deep. As its name implies, the box serves as a junction point for electric wires, a place where wires are spliced. (1:83, Samples). The wires themselves are pulled through conduits, or pipes, and these conduits are run into the box. To allow for this entry of the pipes into the box, holes (called “knockout” holes in the electrical trade, 2:242) must be cut in the box. As the box is mounted on a wall from where the conduits emerge, it is obvious that the holes cut in the box must be at the points where the conduits leave the wall. (1:84).

For the junction box here, nine holes had to be cut so as to match and accommodate nine conduits. (2:239; 5:967; RX 1). In the photo (RX 1), which has the backside, or wall side, fac-

ing the viewer (1:87–88), we see three (vertical) columns of holes in the box. The first two columns on the left have three holes each. The column on the viewer’s right has what apparently was intended to be three holes but, determining that they were off center, the worker redrilled them, giving the three an elongated or mitotic appearance.

Everyone agrees that Albert botched the job. Albert admits he failed to measure one group of three conduits, the group that was coming out of the wall “a little crooked.” (2:226, 228, 230–231). Samples states that an electrician with any experience would have taken a piece of cardboard, placed it against the nine conduits, tapped with a hammer on the cardboard to make indentions around the ends of the conduits so as to mark the locations of the conduits, placed the indented cardboard on the back of the junction box, marked the box so as to match the indentions on the cardboard, and then drilled and cut out holes at the spots marked on the junction box. (1:85). As Albert concedes (2:249), “I wasn’t thinking properly at the time.”

For all the evidence about the junction box, the record lacks an express statement as to which column of three Albert did first. Apparently, however, it is the far right column with the mitotic holes. Apparently it is that mitotic column which primarily causes such consternation that Samples is highly critical of Albert’s ability. (1:53, 86–87). Samples indicates that the far left column of three holes is the only one done correctly (1:83–84, 86), with the holes of the middle column being a bit too large (1:86). The problem is not simply one of aesthetics, for when the front door, or cover, of the junction box is closed the holes cannot be seen. (1:88; 2:240). The problem is one safety, with inadequate grounding leaving the box an electrical shock hazard. To achieve proper grounding, the conduit connector, which passes through a hole, must fit snugly, and be clamped tight to produce “bonding integrity.” (1:85–87). As McLeod asserts (5:967), and Albert acknowledges (2:243), if the seal at the knockout hole is not tight (if bonding integrity has been compromised), and if a wire inside the conduit were to short out, then it could cause the ungrounded junction box to become electrified (“hot”). If the voltage to the box were high enough, then a person touching the “hot” junction box could be “burned” (2:244, Albert) or “seriously injured or killed (5:967, McLeod). As Samples Jr. bluntly states, “It would kill them.” (6:1159).

The differing assessments on the extent of electrical shock injury derives mostly from the different understanding of the nature of the junction box. Albert recalls the junction box as being a box for a fire alarm system operating on 110 volts. (2:243). McLeod (5:964, 965) and Samples Jr. (6:1159) assert that it was to carry 480 volts for the upstairs high-voltage emergency electrical system.

No party offered any of the plans and specifications to show (1) what voltage would pass through the junction box, whether (2) the box had to be explosion proof for voltage higher than 110, and (3) the function to be served by the wires running through the box. Under either version, an improperly grounded junction box would be a safety hazard. Contrary to the suggestion of Albert (2:244), on occasion news stories report the sad event of a worker or homeowner being severely shocked, even killed, by exposure to 110 volts. Finding the firm testimony of McLeod and Samples Jr. more reliable on the point of the voltage and the purpose of the box, I find that the voltage designed for the junction box here was 480.

Eventually, Albert installed the junction box on the wall. Albert acknowledges that, when he installed it, the box had the same holes we could see as the box was displayed in the courtroom. (2:239). All agree that the box, as installed by Albert, would not have passed inspection by the electrical inspector. (2:246, 263–264, Albert; 5:967, McLeod; 6:1158, Samples Jr.). To this point, and aside from the voltage dispute, the parties have been in general agreement concerning Albert's work on the junction box. Now, however, the parties switch from 16 ounce to 8 ounce gloves.

According to Albert (whose recollection about the date is uncertain), in either December 1996 or January 1997 (2:228–229), but probably December (2:230), he installed the junction box. Before hanging it, however, he recognized that he had made a mistake on his measurements. Indeed, he recognized this with the first set (2:263) of holes (apparently the mitotic group of three), so he then called McLeod over, showed him the holes, told McLeod he had made a mistake, and asked McLeod what he wanted Albert to do. (2:229–230, 234, 242, 246, 261–263). “Don’t worry about it,” McLeod reassured Albert, “everybody has a bad day.” (2:230, 234). “Just make the holes fit. Get some sheet metal, cover it up, and then put it on the wall,” McLeod told Albert. (2:246, 261, 263, 264). [Twice Albert answers that the box he showed to McLeod looked the way it appeared at trial. (2:246, 263). He corrected that, however, to explain that it was the first (mitotic) set of holes that he showed to McLeod. (2:263). That is, when he showed the junction box to McLeod, whenever that was, Albert had drilled only the first (mitotic) set of holes, not all nine.]

[The significance of the date here, from the Government's viewpoint, is the contrast with what occurred after Albert's “coming out” for the Union. Before he announced for the Union, McLeod is very understanding of a mistake, and outlines the correction plan. After Albert announces for the Union, McLeod no longer is so accommodating and, assertedly, even invents supposed mistakes by Albert. As we shall see in a moment, McLeod's version is vastly different.]

Albert offered some confusing testimony on the timing of the junction box incident in relation to when he received his January 15 pay raise. Albert initially testified that the junction box incident came “after” the pay raise. (2:231). Following some confusing testimony by Albert, and a statement that he thinks the “mistake” came “after,” he was asked after what, to which he replied, “The raise was after.” (2:231). He then confirmed this response and the timing. (2:232–233). The significance of the pay raise, of course, is whether it was a merit or longevity raise. On brief Mid-State contends the latter (Brief at 34), citing testimony (an answer on cross to a permissibly leading question, 2:254–255) by Albert that Samples Jr. had agreed to give a raise to Albert after 90 days.

There are two fatal problems with Mid-State's contention. First, Albert immediately retracted his answer about the 50 cents after 90 days and testified that Samples Jr. actually had said, “After I see what you know, then I’ll give you a raise.” In (late, apparently) December Albert went to Samples Jr., told him that he had been working by himself doing a variety of tasks, and “I think I deserve a raise.” Samples Jr. said he would have to check with McLeod and the foreman. (2:255). Two weeks or so later Albert received the raise he had requested. Second, as for the 90-day concept, the effective date of January 15 was barely 2 months after Albert was hired.

McLeod acknowledges that Albert's pay increase would be given only if the employee had exhibited good work to that point. (5:1011). The raise, I find, was a merit increase—and given some 3 weeks before Mid-State was notified that Albert was one of the employees organizing on behalf of the Union.

[The merit pay raise is significant only if the junction box incident occurred before the pay raise, for McLeod, as earlier noted, freely acknowledges that Albert did good work before he started organizing for the Union in early February. Albert testified that the junction box incident occurred before he began wearing his Union shirt to work. Asked if he was certain of that, he answered, “To the best of my knowledge, yes.” (2:229).]

Everyone understood that Albert's mounting of the junction box was simply the first phase for the box. When Albert mounted the box, there were no wires in the conduits. At a later date someone would be assigned the task of opening the cover of the junction box and pulling wires through the conduits into the box. (2:240–241). [Presumably, either then or later the wires would be spliced there.] Thus, unlike hiding defective electrical or plumbing work or materials behind a wall, any shoddy workmanship on the holes in the box would be immediately apparent whenever the next person opened the box to pull the wires.

Turn now to McLeod's very different version of the junction box incident. McLeod's first difference with Albert concerns the timing. McLeod places the date of the incident as some 2 to 3 weeks before Albert was terminated (5:965, 1006), or about mid-March 1997—a time after Albert had announced his organizing status for the Union. [Neither party offered any evidence that would serve as independent corroboration of the party's contention on timing of the incident. The record does not disclose whether Mid-State kept records showing when it installed various items or when various steps were taken in the construction process at Physics. McLeod has no (5:1006–1007) entry at all in his log (RX 18) for the junction box incident.]

Second, McLeod insists that what Albert showed him was a single hole that Albert had drilled in a misalignment. (5:964–966, 1006).

Third, although acknowledging (5:965, 1006) that he told Albert, “Don’t worry about it; everybody makes mistakes,” McLeod asserts that he further told Albert (5:965):

I told him to turn [rotate] the box one quarter turn which would take the hole in question out of place. I told him I would get a UL listed knockout seal for that hole. [The record does not show whether he ever did.] I told him to get a piece of cardboard and make a template, and mark off the pipes coming through the wall, and transpose it on the back of the box and re-knock it out.

McLeod's rotation version requires some explanation. As noted earlier, the junction box is shaped as a square. Accordingly, if a hole is cut off center, all the electrician has to do is cover the hole with a “knockout seal” (a piece of metal designed for that purpose, 2:241), rotate the box a quarter turn, and drill a new hole with the proper alignment. (2:241–242, Albert). In fact, as Albert concedes (2:242), because the holes in question (even all nine) are in the top half of the junction box (GCX 7), he could have rotated the box, covered the holes, and drilled new ones in the good half.

The next time McLeod saw the junction box was the day [Monday, March 31] that Samples Jr. fired Albert. (5:966). [McLeod places the occasion as the day before, 5:966, and the day of 5:1005, Albert's termination. As March 30 was a Sunday, and as no evidence shows that Mid-State worked that Sunday, I find that it all occurred on the one day of Monday, March 31, 1997.] McLeod had assigned Zot Szurgot to pull wires into the box. As McLeod describes it (5:966):

When he [Szurgot] got to the box and removed the cover, he saw what it looked like; he come and got me and asked me if I had seen it. I told him no, at which time I saw it. I asked him to remove it from the wall, and I went and called and got another box sent out.

The call is what led to Albert's discharge, for McLeod called Samples Jr. who asked McLeod why he needed another box when Samples Jr. had already sent one over for that location. McLeod explained the problem. Samples Jr. came to Physics, inspected the junction box, returned to the shop, and later that day Albert was discharged. (5:966-967, 1005). Samples Jr. confirms the sequence, confirms that the work had been done wrong and would not pass inspection, confirms that he previously had warned Albert about the quality and amount of his production, states that, as a precaution in view of Albert's union status, he called Mid-State's attorney, and confirms that he decided to terminate Albert. (6:1157-1159). As Albert acknowledges, Samples Jr. had not been at Physics the day of the junction box incident, whenever that incident occurred. (2:239). Nothing suggests that Samples Jr. was aware of it before March 31.

Although Albert did not testify in the rebuttal stage, on cross examination he describes what he did after McLeod assertedly told him to get some sheet metal, cover the holes, and "make them [or it] work." (2:246, 261, 263-264). Over the course of the next 2.5 to 3.0 hours (2:245, 250-251) Albert searched for some sheet metal and fabricated (2:242-244) some metal pieces to cover the holes which he apparently then redrilled in his unsuccessful effort to "make them fit." Some of the fabricated pieces (6:1158) were in the junction box at the trial (1:87), but no record photograph shows them. Asked why he did not use some "knockout seals" to cover the holes, Albert testified that he asked McLeod about doing that, but McLeod just said to get some sheet metal and make the holes fit. (2:246).

Albert denies McLeod's one-hole/rotation version. (2:242). Why did not Albert suggest to McLeod that they simply rotate the box and redrill? His answer (this time)¹¹ was (2:249):

My mind was possibly somewhere else. I wasn't, you know, that's why I had the mistake with the thing. I wasn't thinking properly at the time. I don't know where my mind was at the time. But, I knew once I got done with it and looked at it, it wasn't something that I would, you know, like putting up on a job I was doing.

Samples Jr. asserts that McLeod would never have accepted Albert's work on the junction box. "He is too much of a perfectionist." (6:1160). This testimony is of little value. Not

even Albert contends that the box he showed McLeod in December 1996 looked like that which Zot Szurgot found when he opened the box on March 31, 1997. Then, and only then, did McLeod see all the holes and sheet metal patches that Albert had fabricated to "make it fit." Not only did his own patchwork embarrass Albert, as just quoted (2:249), but even Albert thought that his futile attempt to achieve bonding integrity would not pass inspection. (2:246, 264).

The critical question here is whether McLeod told Albert to rotate and redrill. Or did McLeod, for some strange reason (strange because he knew that any sloppy and unsafe work would not be hidden behind some wall, and strange because the easiest solution of all was right in front of his nose—just rotate and redrill) tell Albert just to make his mitotic holes work by fabricating some sheet metal pieces [And, heavens, don't use any "knockout" seals, just fabricate your own!!] and drilling new holes through those fabricated pieces? What we saw in the courtroom, as in the photo (RX 1), were simply some holes in the junction box. We do not get the full flavor that met McLeod's eyes (and then Samples Jr.'s) on March 31 when he saw the fabricated pieces attached to the holes. As Samples Jr. told Albert in terminating him, Mid-State cannot afford to pay twice for the same work. (2:226, 249-250).

b. Discussion

Contending (Brief at 39-41) that the Government established, *prima facie*, that Albert's discharge was unlawfully motivated, the General Counsel argues, first, that Albert had done good work, for which he was rewarded on January 15, 1997 with a merit pay increase of 50 cents per hour. Second, next came the early February announcement of Albert's status as a Union organizer and the start of Albert's wearing of a Union shirt. Third, the "final" warning was imposed on March 4, just about a month after Albert's "coming out" announcement. Fourth, although Superintendent McLeod had excused Albert's December 1996 mistake on the junction box, Vice President and General Superintendent Samples Jr. seized on it as a pretext to fire Albert. And fifth, add to the foregoing mix the demonstrated animus toward members of the Union's organizing committee, and the weight of the 8(a)(1) allegations [most of which I have dismissed], and unlawful motivation can be inferred. Finally, Mid-State did not carry its burden of showing that it would have taken the same (discharge action) even in the absence of any union considerations.

The General Counsel neither alleges nor argues that the "final" warning of March 4 was unlawful, but merely cites its timing. But timing, even in the conjunction shown here, gives no basis for inferring that the warning was unlawfully motivated. That is especially so where, as here, Albert never denied that he had installed conduits at Physics on a "downhill" angle, and no evidence shows that Mid-State tolerated such from others or failed to warn others who repeatedly were doing poor work. Indeed, the record shows that Mid-State warned others and that McLeod has terminated employees, or recommended such, for employees doing substandard work.

That takes us directly to the junction box "pretext." The Government argues pretext because Superintendent McLeod excused Albert's mistake, thereby proving that Mid-State did not view the mistake as a dischargeable offense, yet after Albert "came out" for the Union, Mid-State fired him because of the junction box mistake.

¹¹ Note that there appears to be a conflict with his earlier (2:246) answer, cited in the preceding paragraph, asserting that he asked McLeod about using "knockout" seals, only to be told to make the holes fit.

As the Government states it, and ignoring a majority of the evidence as to Albert's case, the Government may have described a prima facie case. Unfortunately, the description is a grotesquely distorted view of the case. A good analogy would be the boxer who steps up at the end of the fight and asks the judges to score points for the times he hit his opponent, but to disregard all the knockdowns which he suffered at the hands of that opponent.

The Government's prima facie case must be based on a preponderance of the credible evidence. All record evidence must be considered. I have done that. Respecting the junction box incident, two crucial questions pop up immediately. First, when did the incident occur—before or after the early February "coming out" announcement? Second, whose version of the incident is to be credited—Albert's or McLeod's?

Respecting the first question, concerning timing, I credit the more positive testimony given by Superintendent McLeod over the somewhat vacillating account rendered by Albert. That fixes the date as mid-March, a month or so after Albert's "coming out" announcement, and apparently even after the "final" warning of March 4. The fact that McLeod made no log entry for it shows two things. First, McLeod treated Albert as (3:539) he had done Anthony Baccili Jr.—"straight up." That is, he did not seize on a mistake on Albert's drilling of the first hole to zap him for his Union activities, but simply told him to rotate the box, mark the new quarter correctly, and drill a new hole in the good quarter. Second, it shows that McLeod considered the one-hole off-center drilling very minor. This minor incident was not anywhere near the problem of exposed conduit running "downhill" that had to be replaced, for which poor work McLeod did make an entry. As McLeod clearly did not log every minor event of each day on the job, I infer that he did not log this one because it was so minor. [While he certainly could have logged what he saw on March 31, but did not, there is no dispute that on that date he saw a junction box that, it must have appeared, some lawyer or old ALJ, rather than an electrician, had prepared.]

As for whose version of the incident, I again credit McLeod over Albert. McLeod testified favorably. Moreover, contrasted with McLeod's direct description, Albert appears (as I mentioned earlier) to answer both ways on the question of why he did not recommend to McLeod that they simply rotate the box, initially suggesting that he did ask McLeod about using knockout seals (2:246), yet a mere three pages later (2:249) insisting that he did not do so because "I wasn't thinking properly at the time." Albert, I find, is an unreliable witness. [Respecting the version of the incident, I would credit McLeod even if I were to find that what Albert showed him in mid-March was all three mitotic holes (as Albert contends) rather than just the first hole. Whether one hole or three, all Albert had to do, McLeod told him, was rotate and redrill.]

Although unlicensed, Charles Albert Jr. is an experienced electrician. As of the relevant time, Albert had worked as an electrician for about 11 years. (2:217). Initially Albert did good work. Once he turned his focus to organizing for the Union, however, his work quality and productivity hit the skids. That is why Samples Jr., in giving Albert a "final" warning on March 4, told Albert that (2:222, Albert) he knew Albert was capable of doing better work. Mid-State does not contend that Albert sought to sabotage the Physics job, arguing only that Albert's work suffered because his attention was devoted to organizing for the Union.

Finding that the Government failed to establish prima facie, by a preponderance of the credible evidence, that a motivating reason for Mid-State's discharge of Charles Albert Jr. on March 31, 1997 was Albert's status as an employee organizer for the Union, I shall dismiss complaint paragraph 11(b). That completes coverage of the complaint allegations.

I. The Union's Objections

The Union's election petition (GCX 1y) was filed and docketed as Case 12-RC-8071 on March 7, 1997. Under established Board law, only conduct that occurred between that date and the date of the April 18, 1997 election may be used as grounds for setting aside the Union's election victory. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). Of the complaint allegations falling within this "critical" preelection period, I have dismissed all. The July 24, 1997 order (GCX 1LL) directing a hearing on these objections indicates that the objections, and matters raised during the investigation of the objections, are coextensive with the alleged unfair labor practices in the critical period. That is the understanding of the Union and Mid-State as expressed at the trial (4:869-870) and as reflected on brief by the General Counsel (Brief at 41 fn. 4), and by Mid-State (Brief at 47-48). Having dismissed all such allegations, I now recommend that the Board dismiss the Union's objections and certify the results of the election of April 18, 1997.

CONCLUSIONS OF LAW

1. The Respondent, Mid-State, Inc., is an employer engaged in commerce within the meaning of Section 2(b) and (7) of the Act.
2. International Brotherhood of Electrical Workers, Local 1205, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All electricians, electrician helpers and apprentices employed by the Employer at its Gainesville, Florida facility, excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act.
4. By orally promulgating a no solicitation rule which prohibited solicitation during break time, by threatening that Mid-State would close its business if employees were represented by a union, by engaging in conduct which would reasonably create the impression that employees' union activities were under surveillance, and by threatening to sue employees personally in retaliation for their union activities, Mid-State has violated Section 8(a)(1) of the Act.
5. Mid-State has not violated the Act in any other manner alleged to be unlawful by the Government's July 15, 1997 complaint.
6. The unfair labor practices described above in paragraph 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, Mid-State, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating a no-solicitation rule which prohibits solicitation during breaktime; threatening that Mid-State will close its business if employees are represented by a union; engaging in conduct which would reasonably create the impression that employees' union activities are under surveillance; and threatening to sue employees personally and individually in retaliation for their union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) To the extent it has not already done so, rescind its rule prohibiting solicitation on breaktime.

b. Within 14 days after service by the Region, post at its shop at Gainesville, Florida, and at all its jobsite trailers in the Gainesville, Florida area, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased its operation at the facility involved in this proceeding, the Respondent shall duplicate and

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, 29 CFR 102.46, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, 29 CFR 102.48, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 7, 1996, the date of the first unfair labor practice found in this proceeding.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection.
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate a no-solicitation rule which prohibits solicitation during breaktime.

WE WILL NOT threaten you that we will close our business if you choose to be represented by a union.

WE WILL NOT engage in conduct which would reasonably create the impression that your union activities are under surveillance.

WE WILL NOT threaten to sue you individually and personally in retaliation for your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MID-STATE, INC.